Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PALADIN ENTERPRISES, INC.,
Petitioner,

v.

VIVIAN RICE, as guardian and next friend of TAMIELLE HORN, MARILYN FARMER, co-personal representative of the ESTATE OF MILDRED HORN, TIFFANI M. HORN, co-personal representative of the ESTATE OF MILDRED HORN, MICHAEL D. SAUNDERS, individually and next friend of COLIN D. SAUNDERS, a minor, and personal representative of the ESTATE OF JANICE Y. SAUNDERS,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the publication of a book to a mass, undifferentiated audience, for which it serves a variety of lawful purposes, is protected by the First Amendment when it assists a member of that audience in committing a crime, unless the publication is both directed to and likely to incite imminent lawless action.

2. Whether this Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), applies to expression that advocates or encourages violation of current law or only to "abstract advocacy," defined as "mere abstract teaching of the moral propriety or necessity" of unlawful conduct.

3. Whether the publication of lawfully acquired information, already in the public domain, to a mass, undifferentiated audience is protected by the First Amendment when the information assists a member of that audience in committing a crime.

4. Whether a book disseminated to a mass, undifferentiated audience, for which it serves a variety of lawful purposes, is protected by the First Amendment whether or not it was also published with a purpose to assist would-be criminals, unless the publication is both directed to and likely to incite imminent lawless action.

5. Whether the book at issue in this case, disseminated to a mass, undifferentiated audience for which it serves a variety of lawful purposes, is protected by the First Amendment from civil liability for "aiding and abetting" a criminal act.

LIST OF PARTIES PURSUANT TO RULE 29.6

All parties to this proceeding appear in the caption of the case. Petitioner has no parent companies and no subsidiaries that are not wholly owned.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Paladin Enterprises, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 10, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 128 F.3d 233 and is included in the Appendix ("App.") hereto. The opinion of the district court is reported at 940 F. Supp. 836 and is also included in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 10, 1997. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was filed on November 24, 1997, and denied by Order dated December 12, 1997. This Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech, or of the press.

STATEMENT OF THE CASE

The Court of Appeals has held, for the first time in this nation's history, that a book, available to the public in bookstores and libraries across the country, enjoys no protection under the First Amendment from liability for damages caused by one of its readers. In this case, petitioner Paladin Enterprises, Inc. ("Paladin") did no more than publish 13,000 copies of a book to a mass, undifferentiated audience for which it concededly serves a

variety of unobjectionable purposes. Nevertheless, the Fourth Circuit has declared that the publisher may be held liable in tort for the criminal acts of one of those readers, who allegedly consulted information contained in the book as part of his pre-existing plan—concededly unknown to Paladin—to commit murder.

1. The Crimes of James Perry and Lawrence Horn

In 1991, Lawrence Horn, former husband of Mildred Horn and father of their son, Trevor, entered a conspiracy with career criminal and convicted felon James Perry for Perry to murder Horn's family. *See* J.A. 21 ¶ 11 & 41 ¶ 13; Dk. No. 18, Exs. 67-68.[1] On March 3, 1993, Perry killed Trevor and Mildred Horn, and Janice Saunders, Trevor's nurse. J.A. 61 ¶ 6. Police thereafter searched Perry's residence, where they discovered several criminology texts as well as Paladin's catalogue. Dk. No. 18, Ex. 59. Paladin cooperated with authorities and provided evidence that, in January 1992, *after* he began conspiring with Horn, J.A. 21 ¶ 12 & 41 ¶ 14, Perry had ordered two of its books, including *Hit Man: A Technical Manual for Independent Contractors* ("*Hit Man*").[2]

Evidence of these orders, introduced through a Paladin employee at Perry's trial, helped establish his premeditation. Dk. No. 18, Ex. 71. Perry has been sentenced to death and his conviction has been affirmed. *See Perry v. State*, 686 A.2d 274 (Md. 1996), *cert. denied*, 117 S. Ct. 1318 (1997). Horn has been sentenced to life in prison.

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[1] References to the Joint Appendix in the Court of Appeals are denoted herein as "J.A." References to exhibits filed in support of Paladin's motion for summary judgment in the district court are denoted by the appropriate docket ("Dk. No.") and exhibit number ("Ex.").

[2] The second title, *How to Make Disposable Silencers, Volume II: A Complete Illustrated Guide*, is referenced only in passing in Respondents' complaints, which focus—like both of the decisions below—entirely on *Hit Man*.

The complaints in this action allege that Perry employed many of the methods described in *Hit Man*. For purposes of its motion for summary judgment, Paladin conceded that whether Perry followed those instructions and whether they assisted him remain disputed issues of fact that must be resolved in Respondents' favor. J.A. 61 ¶¶ 6-7; App. 16a n.2. It is, however, undisputed that Perry's methods, to the extent they resemble those described in *Hit Man*, are routinely featured in other publications, some of which were also found in Perry' possession. *See* pp. 7-9 *infra*.

Beyond filling Perry's mail order, Paladin had no contact with him and had none at all with Lawrence Horn. J.A. 59 ¶ 3; App. 16a n.2. Paladin had no knowledge of Perry's conspiracy with Horn, that either of them planned to commit a crime, or that Perry intended to kill anyone. J.A. 61 ¶ 9; App. 16a n.2.

2. The Books of Paladin

Paladin is a book publisher. It publishes hundreds of volumes discussing self-defense, weapons and martial arts, and various ways of "beating the system." Dk. No. 18, Ex. 1. Several of Paladin's books, including *Hit Man*, have been recommended by law enforcement and mystery writers' organizations. *Id.*, Exs. 29, 31, 33-35; J.A. 90 ¶¶ 24-25 & 91 ¶¶ 27-28. Many of them are palpably ambiguous as to whether they are to be taken as fact, fiction, or fantasy. *See* J.A. 83-84 ¶ 16a. Paladin's books consistently express disdain for government and its restrictions on individual liberty, and trumpet the benefits of self-reliance. *See, e.g.*, Dk. No. 18, Ex. 1, at 5, 15, 17.

It is undisputed that Paladin sells its books—including *Hit Man*—to a mass, undifferentiated audience through conventional channels of distribution, including "bookstores and public libraries" throughout the nation, as well as to "law enforcement agency libraries, police association and union libraries," and to "wholesalers and distributors,

who sell to book stores, libraries, and similar retail or institutional buyers." J.A. 101-02 ¶¶ 2.a & 2.b.[3] Paladin's marketing strategy is designed and "intended" to maximize sales of its books to the public, including (1) authors who desire information for the purpose of writing books about crime and criminals; (2) law enforcement officers who seek information about methods of committing crime; (3) persons who enjoy reading accounts of crime and the means of committing them for purposes of entertainment; (4) persons who fantasize about committing crimes but do not thereafter do so; and (5) criminologists and others who study criminal methods. *Id.* 59 ¶ 4.a & 60 ¶ 5.a; App. 16a n.2. For purposes of its summary judgment motion, Paladin conceded that whether its marketing strategy reflected as well an "intent" to sell its books to criminals and would-be criminals remained a disputed issue of fact that must be resolved in Respondents' favor at this stage of the litigation. J.A. 58-62; App. 16a n.2.

For the same reason, Paladin also conceded below that, when it published *Hit Man*, it "knew" and "intended" that the book would be purchased by all of the foregoing categories of readers and used by them for a broad range of lawful and unlawful purposes. J.A. 59 ¶ 4.b & 60 ¶ 5.a

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[3] The Court of Appeals' assertion to the contrary, *see* App. 43a-44a, finds no support in the record and is, in fact, entirely inconsistent with it on this and several other material points. Indeed, much of the Fourth Circuit's rendition of the underlying facts ignores the parties' *stipulations* contained in a Joint Statement of Facts submitted to the district court. *See* p. 10 *infra*. In a case such as this, where "the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated,' " *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 n.50 (1982) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *Speiser v. Randall*, 357 U.S. 513, 525 (1958)), this Court "must 'make an independent examination of the whole record' " to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression," 458 U.S. at 915 n.50 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)). *See also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567-68 (1995) (same).

& b; App. 16a n.2. Nevertheless, the record indicates that, since its initial publication in 1983, *Hit Man* has been sold to some 13,000 readers, and there is no evidence that anyone other than James Perry allegedly consulted it in committing a murder. During that same period, the book has remained easily accessible on the shelves of libraries and bookstores throughout the country, J.A. 101-02, including the Library of Congress (L.C. Call No. HV6515.F431983).

Hit Man purports to have been written by "Rex Feral," a translucent pseudonym that literally means "King of the Wild Animals." The Paladin catalogue states:

> Rex Feral kills for hire. Some consider him a criminal. Others think him a hero. In truth, he is a lethal weapon aimed at those he hunts. He is a last recourse in these times when laws are so twisted that justice goes unserved. He is a man who feels no twinge of guilt at doing his job. *He is a professional killer.*
>
> Learn how a pro gets assignments, creates a false identity, makes a disposable silencer, leaves the scene without a trace, watches his mark unobserved and more. Feral reveals how to get in, do the job and get out without getting caught. *For academic study only.*

Dk. No. 18, Ex. 1, at 41. This reference represents the sum total of Paladin's efforts to "market" *Hit Man*.

Multiple copies of the book have been lodged with the Clerk and are available for this Court's inspection. On its face, the book resembles a comic book more than a "technical manual." Indeed, at Perry's trial, the prosecutor displayed *Hit Man* to the jury and said, "[s]ee the cover—almost comical," adding that it was "[a]mazing . . . that James Perry followed this book." *Id.*, Ex. 70, at 55.

Throughout its opinion, the Fourth Circuit declares that *Hit Man* is "devoid . . . of any political, social,

entertainment, or other legitimate discourse." App. 45a; *see also* App. 32a, 61a-62a, 71a. The Court of Appeals' "chapter-by-chapter synopsis" of the book, *see* App. 48a-59a, is, however, demonstrably truncated. Most significantly, it omits *any* reference to *Hit Man's* extensive "Prologue," which presents a stylized third-person account of a professional "hit" and serves as the literary vehicle through which the remainder of the book's "story" is told. The Prologue is indistinguishable from thousands of portrayals of the escapades of "hit men" found in popular culture. J.A. 228, at 1-8. The Court of Appeals also largely disregards the book's "Preface," which articulates "Rex Feral's" rationalization for contract murder:

> There are many, many instances when atrocities are committed that the law will not or cannot pursue. And other times when the law does its part but the American legal system is so poor that *real* justice is not served. In those cases, as in cases of personal revenge or retribution, a man must step outside the law and take matters into his own hands.

J.A. 228, at ix.

The book's remaining chapters describe a wide variety of methods purportedly used by hit men that are familiar to readers of pulp fiction, some of which are excerpted by the Court of Appeals. *See* pp. 7-9 *infra*. Several such descriptions are, moreover, decidedly unprofessional and plainly bizarre.[4] At one juncture, the author intones that "many a man has been caught because he thoughtlessly

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[4] Many of these "instructions," largely omitted from the opinion below, border on the absurd—*e.g.*, requiring an "employer" to complete an information sheet on a pre-printed form that contains the directions, "Print plainly. Answer all questions as completely as possible. Use additional sheets if necessary," J.A. 228, at 73-80; the suggestion that a viable means of death is ordering a blowfish from a pet store and applying the toxic contents of the fish's bladder to a toothpick to be left for the victim's use, *id.* at 61-62; and warnings of caution in using the victim's bathroom facilities because of the possibility of leaving a telltale mark from one's buttocks, *id.* at 104.

removed his gloves after making the kill to help himself to food or drink from the victim's refrigerator." J.A. 228, at 104. These aspects of *Hit Man*, not to mention its constant allusions to "toys that would make James Bond envious," *id.* at 34-35, provide the reader with plain signals that "Rex Feral's" status as "hit man" turned author is the stuff of fantasy. *See also id.* at 37 ("while disguising myself as a writer I chanced to interview a former law enforcement officer"); *id.* at 128. In the book's final paragraph, "Rex" confides, apparently with tongue firmly planted in cheek, that:

> [S]ome day, when you've done and seen it all, when there doesn't seem to be any challenge left or any new frontier left to conquer, you might just feel cocky enough to write a book about it.

Id. at 130.

3. Other Publicly Available Information

It is undisputed that the information concerning "how to" commit murder described in *Hit Man* is available as well from many other publicly available sources. The record before the district court included a broad array of popular non-fiction books, detective magazines, and motion pictures that contain detailed descriptions of actual murders and how they were committed. *See* J.A. 69-75 ¶¶ 12-14, 83-87 ¶ 16; Dk. No. 18, Exs. 14-23. Such popular works, available in bookstores, libraries, and at the local movie house and video store, include *Contract Killer* (Dk. No. 18, Ex. 18) (the story of hit man Donald Frankos, which provides technical details of successful contract murders); *Mafia Enforcer* (*id.*, Ex. 19) (same, with respect to hit man Cecil Kirby); *Perfect Crimes* (*id.*, Ex. 22) (twelve chapters, each a blueprint for a nearly flawless crime); *The Squad* (*id.*, Ex. 23) (purportedly a factual account of the methods employed by an illegal hit team within the FBI); and *Wiseguy* (the subject of the film *Goodfellas* and of this Court's decision

in *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991)).[5]

In addition, bookstores and public libraries offer extensive collections of forensic investigation manuals, which teach what police look for and, when armed with such knowledge, how to avoid detection. *See, e.g.*, Dk. No. 18, Exs. 20, 21 & J.A. 71 ¶ 12f. Indeed, three such volumes, *Criminal and Civil Investigations Handbook*, *Interpretation of Blood Stains*, and *Management of Gunshot Wounds*, were found in Perry's possession. Dk. No. 18, Ex. 59. There is also a broad market for works describing the technical details of how crimes, including murder, are committed, purportedly for the use of mystery writers. *See* J.A. 75 ¶ 14b-g & 90 ¶ 20; Dk. No. 18, Ex. 25. The United States Military publishes instructional manuals that describe assassination techniques for use against *civilians*, books that have been broadly republished for informational purposes. *See, e.g.*, Dk. No. 18, Exs. 17 & 24.[6]

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[5] The record also includes a series of volumes written by Dave Fisher, and published by Pocket Books, which purport to be "as told" by an active hit man, who uses the pseudonym "Joey." These widely available works serve as the vehicle through which "Joey" describes in detail his methods of committing 38 murders. *See* Dk. No. 18, Exs. 14-15.

[6] *See also Assassination: A Primer*, Harper's, Aug. 1997, at 22-24 (reprinting portions of declassified CIA training manual, including that the "most reliable methods are severing the spinal cord in the cervical region (with the point of a knife or a light blow with an ax or hatchet) and severing the jugular and carotid blood vessels on both sides of the windpipe"); *Bomb books concern gun groups*, Milwaukee J. Sentinel, June 4, 1995, 1995 WL 2985808, at A1 ("For $6.95, one can buy U.S. Army publications that show the correct way to build and use incendiary bombs."). Traditional news reports and commentary also contain detailed information concerning the methods of crime. *See, e.g.*, Dateline NBC, Nov. 26, 1996, 1996 WL 6704778 (providing explicit instruction concerning "how to" place explosive device on airliner); Peter Kornbluh, *The CIA's Foreign Policy*, N.Y. Times, May 31, 1997, at A19 (reprinting diagrams from CIA assassination manual).

And, of course, fiction by authors such as Robert Ludlum, Frederick Forsythe, and Tom Clancy detail techniques for committing what is or comes close to being the perfect crime. *See* J.A. 69-72 ¶ 12. This literary genre is successful because of verisimilitude achieved through technical detail, including *each* of the techniques described in *Hit Man* or employed by Perry. Thus, for example, the popular works *Hit on the House*, *id.*, Dk. No. 18, Ex. 10, and *Cause of Death*, J.A. 85 ¶ 16c, available in any bookstore or public library, recommend a 22-caliber weapon at short range, shooting the victim in the eye, and the need to stand a distance from the victim to avoid blood splatter. *See also* T. Clancy, *Without Remorse*, Dk. No. 18, Ex. 12, at 221, 249. The AR-7 rifle (*Hit Man*, J.A. 228, at 21) is featured in novels (Dk. No. 18, Ex. 10) and in movies (J.A. 99 ¶ 3nn). The same is true of, among many others, the following descriptions in *Hit Man*: firearm serial number removal; fingerprint removal and avoidance; and the technique of using three shots, short range, to the head. *See* J.A. 72-74 ¶ 13.[7]

4. The District Court Proceedings

Respondents instituted these civil actions in December 1995 asserting, *inter alia*, that Paladin should be held liable in tort for "aiding and abetting" Perry's crimes.[8] Respondents' complaints alleged that, by publishing *Hit Man*, Paladin had rendered substantial "assistance" to Perry and had done so with an "intent" to facilitate his criminal conduct as required by Maryland law. *See Alleco, Inc. v. Harry & Jeanette Weinberg Found.*, 665 A.2d 1038, 1049-50 (Md. 1995).

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[7] *See also* Jack Hitt, *Plotting the Perfect Murder: Five Great Mystery Writers Create the Perfect Crime*, Dk. No. 27, Ex. D; Major John L. Plaster, USAF, ret., *The Ultimate Sniper*, Dk. No. 18, Ex. 36.

[8] Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1332.

Shortly thereafter, the parties and the trial court agreed that, to forestall the considerable burden and expense that would inevitably attend potentially unnecessary discovery, Paladin would file an early summary judgment motion to determine "whether the First Amendment is a complete defense, as a matter of law, to the civil action set forth in the plaintiffs' Complaint." J.A. 58-59; App. 16a n.2. Accordingly, the parties executed a "Joint Statement of Facts," which contains "facts that the plaintiffs and/or defendants would be able to establish by affidavit or otherwise in the context of defendant's motion of summary judgment." *Id.* In addition, the "Joint Statement" expressly afforded all parties the opportunity to contest the materiality of the facts set forth in the Joint Statement and to put before the district court additional undisputed facts relevant to the constitutional issue raised by Petitioner's summary judgment motion. Thus, Paladin filed, along with its motion, four declarations accompanied by more than 70 exhibits. *See* Dk. No. 18. Respondents chose to rely exclusively on the Joint Statement.

By Order dated August 30, 1996, the district court granted Paladin's motion. *See* App. 106a-31a, 132a-33a.[9] The district court explained that the "First Amendment bars the imposition of civil liability on Paladin unless *Hit Man* falls within one of the well-defined and narrowly limited classes of speech that are unprotected by the First Amendment." App. 81a. Thus, the trial court rejected Respondents' contention that the First Amendment does not apply to "speech aiding and abetting murder," as defined by state law, App. 81a-89a, and concluded that "the only category of unprotected speech under which *Hit Man* could conceivably be placed is

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[9] On September 6, 1996, the district court modified its opinion, in the wake of Respondents' motion for reconsideration, both to acknowledge that Maryland has recognized a tort of "aiding and abetting" in some circumstances and to emphasize that that fact had no bearing on its resolution of the constitutional issue raised by Paladin's summary judgment motion. *See* App. 74a-99a.

incitement to imminent lawless activity as defined in *Brandenburg v. Ohio*, 395 U.S. 444 (1969)." App. 82a.

The district court then determined, as a matter of law, both that the *Brandenburg* test had not been satisfied and that Paladin's subjective intent was "irrelevant" to that determination. App. 94a-95a. The book's text, the court concluded, is not "directed at inciting" illegal conduct, App. 95a-96a, and the *context* in which it was published precludes a finding that it was *likely* to produce *imminent* illegal action:

> The deadly information is contained in books that presumably take time to read. The books are available to an unlimited number of people at different times. At worst the books amount to nothing more than advocacy of illegal action at some indefinite future time.

App. 96a.

5. The Decision Below

On November 10, 1997, the Court of Appeals reversed. App. 71a. It held that Paladin may be liable in tort because "speech . . . that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment . . . at least where, as here [1] the defendant has the specific purpose of assisting and encouraging the commission of such conduct *and* [2] the alleged assistance and encouragement takes a form other than *abstract advocacy*." App. 18a (bracketed numbers and emphasis added). According to the Fourth Circuit, a book published under such circumstances does not contain "speech" within the meaning of the First Amendment, but is rather a "speech act," which enjoys no constitutional protection. App. 22a-28a, 30a-31a.

Thus, central to the Court of Appeals' holding is its conclusion that *Hit Man* is not entitled even to *application* of the "incitement to imminent lawless action" standard articulated in *Brandenburg* because it does not

constitute "abstract advocacy." The Court of Appeals' dismissal of *Brandenburg* flows from its determination that this Court's "short, *per curiam* opinion" in that case "is, by any measure, elliptical," and that its articulation of substantive law therefore should not be taken literally. App. 64a. Instead, the court below determined that *Brandenburg*'s "approving quotation from" *Noto v. United States*, 367 U.S. 290, 297-98 (1961), should be read to "confirm" that the *Brandenburg* standard applies only to "abstract advocacy"—*i.e.*, " 'mere *abstract* teaching . . . *of the moral propriety or even moral necessity*' for resort to lawlessness." App. 64a-65a (quoting *Noto*).

In this case, the Court of Appeals concluded, *Brandenburg* is not relevant because *Hit Man*, in that court's estimation, contains "not so much as a hint of the theoretical advocacy of principles divorced from action that is the hallmark of protected speech." App. 71a.[10] And, despite the parties' express stipulation and uncontroverted record evidence to the contrary, see J.A. 101-02; note 3 *supra*, the Court of Appeals further purported to ascertain both that Paladin "does not sell books through retail outlets," but only to a "limited self-selected group of people interested in learning from and being trained by a self-described professional killer," App. 44a, and that "a jury could readily find" that the book's only "communicative 'value' is the indisputably illegitimate one of training persons how to murder." App. 32a.[11]

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[10] *But see* App. 39a (*Hit Man* "so effectively written that its protagonist seems actually to be present at the planning, commission and cover-up of the murders the book inspires").

[11] The Court of Appeals' conclusion in this regard ignores the parties' stipulation that *Hit Man* was not only "intended" by Paladin to be purchased by a variety of law-abiding readers, *see* App. 45a n.8 (misconstruing relevant stipulation), but also that Paladin "had knowledge" such persons were *in fact* among the 13,000 who have purchased the book. J.A. 60 ¶ 5(b); App. 16a n.2. Moreover, Paladin submitted unrebutted affidavits, which established through exhibits thereto that *Hit Man* has been recommended reading for, among others, law enforcement officers and novelists. *See* J.A. 90 ¶¶ 24-

Finally, the Court of Appeals suggested—albeit in a footnote—that Paladin's concession that its subjective intent remains an issue of fact creates a *material* dispute concerning whether the *Brandenburg* standard is satisfied in any event. *See* App. 64a n.11. According to the Fourth Circuit, even if *Brandenburg* were otherwise applicable, "Paladin's remarkable stipulation that it *knew* that its murder manual would be used by murderers . . . 'upon receipt' to assist them" and "that the publisher *intended* that the manual would be so used" could lead a jury to conclude that the book was "likely to incite imminent lawlessness." *Id.* (emphasis added).[12]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH *BRANDENBURG v. OHIO* AND ITS PROGENY

The Court of Appeals' analysis proceeds from the premise that this Court's decision in *Brandenburg v. Ohio* "is, by any measure, elliptical," "inartful," and therefore fails to provide meaningful guidance to lower courts. App. 64a. Thus, the Court of Appeals considered itself

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25 & 91 ¶¶ 27-28; Dk. No. 18, Exs. 33, 35. A stipulation by the parties is no longer a disputed fact and it is an error of law to characterize it as one party's "contention," App. 45a-46a, which a jury is free to ignore. *See, e.g., Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 113-14 (1939). Accordingly, the Fourth Circuit's conclusion that *Hit Man* is "pure and simple, a step-by-step murder manual," App. 62a, can survive neither an independent review of the book itself nor an objective assessment of the undisputed and stipulated facts of record. *See* note 3 *supra* & note 13 *infra*.

[12] Paladin filed a timely petition for rehearing and suggestion for rehearing *in banc*. Promptly thereafter, the Fourth Circuit ordered Respondents to respond to the petition and, *sua sponte*, requested that the Department of Justice submit its views as well. App. 134a-35a, 136a, 137a. By order dated December 12, 1997, however, before the Justice Department had an opportunity to respond to the court's request, the Fourth Circuit summarily denied the petition. App. 139a.

unencumbered by *Brandenburg*, or by subsequent decisions of this Court, in determining that the constitutional standard set forth in that case applies only to "abstract advocacy," defined as " 'mere *abstract* teaching . . . *of the moral propriety or even moral necessity*' for resort to lawlessness," but not to expression otherwise " 'advocating or teaching' " illegal conduct. App. 64a (emphasis in original) (quoting *Noto v. United States*, 367 U.S. at 297-98). In so holding, the Fourth Circuit relied on its own previous decisions, which had similarly suggested that the " 'cloak of the First Amendment envelops critical, but abstract discussions of existing laws, but lends no protection to speech which urges listeners to commit violations of current law.' " App. 25a (quoting *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985)).[13]

The Fourth Circuit's narrow construction of *Brandenburg* stands in stark contrast with the precise holding in that very case. In *Brandenburg*, this Court broadly held that states may "forbid or proscribe *advocacy of the use*

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[13] *See also United States v. Fleschner*, 98 F.3d 155, 158-59 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2484 (1997). As an independent review of *Hit Man* demonstrates, *see* note 3 *supra*, the Fourth Circuit's conclusion that the book is "devoid . . . of any political, social, entertainment or other legitimate discourse," App. 45a, and therefore does not constitute "abstract advocacy" as defined by the Court of Appeals, cannot withstand analysis. *See* pp. 6-7 *supra* (quoting book's Preface and Prologue). The book's expressed rationale for contract murder—born of frustration with the inefficiencies and inequities of the criminal justice system—is an "expression of dissatisfaction with the policies of this country [that constitutes] expression situated at the core of our First Amendment values." *Texas v. Johnson*, 491 U.S. 397, 410 (1989). It is, therefore, incorrect to say that "[i]deas simply are neither the focus nor the burden" of *Hit Man*. App. 62a. However unsavory the book's ideology may be to law-abiding citizens, it is political and social ideology nevertheless and its "advocacy" is "part and parcel of social or political discourse," App. 66a, no less than the race-baiting at issue in *Brandenburg*, or an admitted murderer's rendition of his own crimes in *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991). *See Winters v. New York*, 333 U.S. 507 (1948).

of force or of law violation" only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. at 447 (emphasis added). By its very terms, *Brandenburg* refers to "*advocacy* . . . of law *violation*" of any sort, not simply "abstract discussions of existing laws" or "vague, rhetorical threats of political or socially motivated violence." App. 25a, 61a, 66a (citation omitted). Indeed, it is difficult to envision a case in which "abstract" discussion could ever be either "directed to" or "likely to produce or incite imminent lawless action."

This Court has repeatedly applied the *Brandenburg* incitement test to expression that in no sense can be construed as abstract "discourse critical of government, its policies, and its leaders." App. 32a. In *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977) (quoting *Brandenburg*), for example, a case involving advertisements advising the public about contraceptives, this Court held that "whatever might be the case if the advertisements directly incited illicit sexual activity among the young, none of the advertisements in this record can even remotely be characterized as 'directed to inciting or producing imminent lawless action and . . . likely to produce such action.'" By the same token, the expression to which this Court has extended the protections of *Brandenburg* can hardly be considered the "'mere abstract teaching . . . of the moral propriety or even moral necessity' for resort to lawlessness." App. 64a. *See, e.g., Brandenburg v. Ohio*, 395 U.S. at 446 ("there might have to be some revengeance taken"); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) ("We'll take the . . . streets later."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 902 ("If we catch any of you going in any of them racist stores, we're gonna break your damn neck.").[14]

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[14] *See Availability of Bomb-Making Information on the Internet: Hearing Before the Subcomm. on Terrorism, Tech. & Gov't Information of the Senate Comm. on the Judiciary*, 104th Cong. 17 (1995)

The Court of Appeals' conclusion that *Brandenburg* should be all but dismissed as a cursory, *per curiam* decision is further belied by its well deserved reputation as a landmark ruling recasting—through its express rejection of the line of authority exemplified by *Whitney v. California*, 274 U.S. 357 (1927)—our First Amendment jurisprudence. By overruling *Whitney*, *Brandenburg* confirmed that the Constitution honors Justice Brandeis' enduring observation that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of law, not abridgment of the rights of free speech." 274 U.S. at 378 (Brandeis, J., concurring).

As this Court explained in *NAACP v. Button*, 371 U.S. 415, 429 (1963), "[a]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy." [15] The Court of Appeals' assertion to the contrary, *see, e.g.*, App. 32a, conflicts as well with the conclusion of most commentators that *Brandenburg* and its progeny necessarily limit the reach of cases such as *Noto v. United States*, 367 U.S. at 297-98, on which the Fourth Circuit relies. *See* 395 U.S. at 448-49 (quoting *Noto*) (emphasizing that even expression "advocating or teaching" the use of "violent action" remains protected unless it "incite[s] . . . imminent lawless action"); Harry Kalven,

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(statement of Robert S. Litt, Deputy Ass't Att'y Gen'l) ("[T]he legal principles are clear. The First Amendment protects speech—even speech that advocates or instructs illegal action—unless there is an imminent danger of, and an incitement to, lawless action, or unless the speech itself constitutes a crime. . . . [I]t is generally not possible to penalize speech unless the speech crosses the line from providing information or mere advocacy to inciting imminent lawlessness or participation by the speaker in illegality.")

[15] *See also NAACP v. Claiborne Hardware Co.*, 458 U.S. at 910 ("Speech does not lose its protected character" when it serves to "coerce" recipients "into action;" the First Amendment " 'extends to more than abstract discussion, unrelated to action.' ") (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

Jr., *A Worthy Tradition* 124, 216 (1988) (*Brandenburg* "extends [its] protection to all advocacy of violence, including advocacy of particular acts").[16]

Brandenburg reflects this Court's consistent admonition that "'[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within' narrowly limited classes of speech." *Hess v. Indiana*, 414 U.S. at 107 (quoting *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972)). By restricting the protection afforded by *Brandenburg* to "abstract advocacy," therefore, the Fourth Circuit has the law exactly backwards. As Judge Easterbrook has explained, in a decision affirmed by this Court, "[c]ases such as *Brandenburg v. Ohio* and *NAACP v. Claiborne Hardware* hold that a state may not penalize speech that does not cause immediate injury" because a "law awarding damages for assaults caused by speech also has the power to muzzle the press." *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). To be sure, "[m]uch speech is dangerous. Chemists whose work might help build a bomb . . . leave loss in their wake. Unless the remedy is very closely confined, it could be more dangerous than all the libel judgments in history." *Id.*

Finally, the Fourth Circuit's alternative conclusion—*i.e.*, that Paladin's stipulation concerning its state of mind creates a jury issue with respect to whether the *Brandenburg* standard is satisfied in any event, *see* App. 64a n.11—is also in marked conflict with that very case. The *Brandenburg* standard is an objective one, which requires

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[16] *Accord* Franklyn S. Haiman, *"Speech Acts" and the First Amendment* 22 (1993) (In *Noto*, this Court permitted punishment of "advocacy of illegal action whether that action was to be taken 'now or in the future' . . . . Not until 1969 [in *Brandenburg*] was the more speech-protective requirement that the potential danger be *immediate* added to the mix."); Staughton Lynd, Comment, Brandenburg v. Ohio: *A Speech Test for All Seasons?*, 43 U. Chi. L. Rev. 151, 159 (1975) (*Brandenburg* "implicitly repudiat[ed] the temporally-remote incitement notion" applied in *Noto*).

a threshold assessment both as to (1) the publisher's intent as reflected *in his words* and (2) the likelihood that those words will cause imminent lawless action. 395 U.S. at 447.[17] Before a defendant's state of mind ever becomes dispositive, the *Brandenburg* line of cases requires that the court first evaluate objectively whether the expression at issue, in the context in which it was published, is both "directed to" *and* "likely to incite or produce" imminent lawless action. 395 U.S. at 447.[18] In this case, therefore, the district court properly concluded that because *Hit Man* is, *inter alia*, published to a mass audience for which it serves a variety of lawful purposes, it cannot constitutionally be made the subject of civil liability. App. 95a-96a. *See, e.g., Hess v. Indiana*, 414 U.S. at 108-09.[19]

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[17] *See Texas v. Johnson*, 491 U.S. at 409 (*Brandenburg* requires "careful consideration of the actual circumstances surrounding" the expression at issue); *Hess v. Indiana*, 414 U.S. at 108-09 (incitation to imminent lawless action must be gleaned from "the import of the language"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 929 (court must focus on the defendants' "speeches themselves"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) (plurality opinion) ("line between permissible advocacy and impermissible incitation to crime" depends both "on the setting in which the speech occurs" and "exactly what the speaker had to say"); *People v. Rubin*, 158 Cal. Rptr. 488, 491 (Ct. App. 1979) ("we are not concerned with Rubin's specific intent. Rather, we must evaluate Rubin's words in the light of their attendant circumstances to determine" whether they can be penalized under *Brandenburg*).

[18] Put differently, absent a judicial determination that *Hit Man* satisfies the objective requirements set forth in *Brandenburg*, its publisher's "intent" is simply not a material fact relevant to a court's assessment of whether the First Amendment protects the book's dissemination as a matter of law. *Accord Dennis v. United States*, 341 U.S. 494, 583 (1951) (Douglas, J., dissenting) (constitutional protection must properly turn "on *what is said*," not "on the *intent* with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen") (emphasis added); *Yates v. United States*, 354 U.S. 298, 318-19 (1957). *See* pp. 27-29 *infra*.

[19] *Accord* App. 185a (U.S. Department of Justice, Report on the Availability of Bombmaking Information (April 1997) (hereinafter

II. THE DECISION BELOW CONFLICTS WITH THOSE OF OTHER FEDERAL AND STATE APPELLATE COURTS

Decisions in several other circuits—not even cited by the Court of Appeals—are also in direct conflict with its narrow construction of *Brandenburg*. The Fifth Circuit, for example, has twice held that books, magazines and other publications containing detailed, "how-to" instructions *must* be measured by the *Brandenburg* standard when the information they contain allegedly assists or otherwise causes a third party to act unlawfully. In *High Ol' Times, Inc. v. Busbee*, 621 F.2d 141, 142 (5th Cir. 1980) (*per curiam*), the Fifth Circuit declared unconstitutional a Georgia statute that criminalized distribution of "printed material" purporting to "describe" and "explain" the "method" by which illegal drugs could "be obtained or produced," 456 F. Supp. 1035, 1038 (N.D. Ga. 1978) (quoting Ga. Code § 26-9912). The State proffered two examples of "printed material" it asserted could constitutionally be sanctioned under the statute—an article in *High Times* magazine bearing the headline "Best Smuggling Vehicles," and "The Whole Drug Manufacturers Catalog." *Id. See* J.A. 119-22, 123-42. The court rejected this contention, holding that such publications constituted neither "a direct solicitation of unlawful activity" nor "incitement to imminent lawless action" within the meaning of *Brandenburg*:

> Reasonable minds could not differ, the requisite seriousness of the threat and imminence of action are

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"DOJR")) ("[I]t is doubtful that general publication of written material advocating illegality can ever be proscribed under the *Brandenburg* test."). The DOJR, prepared by the Department of Justice as required by Section 709(a) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1297 (1996), was formally submitted to Congress in April 1997, on the eve of oral argument in the Fourth Circuit in this case. Accordingly, the Court of Appeals ordered the parties to submit supplemental briefs, following oral argument, addressing the DOJR. The entire DOJR is reproduced at App. 141a-223a.

> not presented in *any* of the sample material entered into evidence. The defendant has not offered and the court has not found any instance when the written word, unassociated with any disruptive conduct, has met this grave test. The test of "inciting or producing imminent lawless action" in *Brandenburg v. Ohio* [ ] is simply not satisfied by the plaintiffs' sale or display of the books, magazines, and posters exemplified herein.

456 F. Supp. at 1039-40 (emphasis added).[20]

Similarly, in *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), *Hustler* magazine published an article entitled "Orgasm of Death," which contained detailed instructions on "how to" engage in autoerotic asphyxiation through hanging. *See id.* at 1018. A young man followed these instructions and died. Invoking *Brandenburg*, the Fifth Circuit reversed a jury verdict in favor of the deceased's family. The court expressly rejected the contention—embraced by the Fourth Circuit here—that "a less stringent standard than the *Brandenburg* test be applied in cases involving non-political speech that has actually produced harm." *Id.* at 1024. As the Fifth Circuit recognized:

> The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.

Id. at 1019. Indeed, the court—as it had in *Busbee*—questioned whether the *Brandenburg* standard can *ever*

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[20] *Accord Eclipse Enters. v. Gulotta*, No. 97-7099, 1997 WL 806997, at *4 (2d Cir. Dec. 9, 1997) (declaring unconstitutional law that criminalized sales to minors of trading cards describing heinous crimes by "declin[ing] any invitation to expand . . . [this Court's] narrow categories of [unprotected] speech to include depictions of violence" that do not constitute "direct incitement of lawless action").

strip expression disseminated to a mass audience of constitutional protection. *See id.* at 1022.

Other circuits, most notably the Ninth, have applied *Brandenburg* to speech containing instruction in how to commit crimes, in a context removed—in the same fashion as the Fourth Circuit characterized *Hit Man*—from "abstract advocacy." App. 31a-33a. In *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985), then-Judge Kennedy explained that, even when a properly instructed jury finds that a defendant "aided and abetted" violation of the tax laws, "[w]here there is some evidence . . . that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a defense based on the First Amendment" may properly be interposed. Thus, Justice Kennedy wrote, "[w]here the indictment is for counseling, the circumstances of the case determine whether the First Amendment is applicable, either as a matter of law or as a defense to be considered by the jury." *Id.* Indeed, even though Freeman had "encouraged" tax avoidance, had manifested a criminal purpose in doing so, and had "assisted" his audience in committing tax fraud, the Ninth Circuit held that the bulk of his conviction could not be squared with the First Amendment unless "the objective meaning of the words used are so close in time and purpose to a substantive evil" to satisfy *Brandenburg*. *Id.* at 552.

Similarly, in *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983), the Ninth Circuit reversed a conviction for aiding and abetting preparation of fraudulent tax returns because the expression on which it was based deserved protection under *Brandenburg*. The Ninth Circuit held that "*nothing should be clearer* at this stage in the development of first amendment jurisprudence" than that expression disseminated to a mass audience, which is said to "aid and abet" unlawful conduct, cannot be sanctioned *unless* it satisfies the "incitement to immi-

nent lawless action" standard. *Id.* at 1428 (emphasis added). Indeed, the court in *Dahlstrom* expressly predicated its holding on the assumption that "the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally." *Id.*[21]

These Ninth Circuit decisions conflict as well with the Fourth Circuit's uncabined rationale that the so-called "speech-act doctrine" requires the conclusion that "the provision of instructions that aid and abet another in the commission of a criminal offense is unprotected by the First Amendment." App. 22a-23a. In fact, as *Freeman*, *Dahlstrom*, and other decisions demonstrate, the *Brandenburg* "incitement" standard has been consistently applied to speech alleged to "aid and abet" crime where, as here, the expression at issue was disseminated to a mass, undifferentiated audience for whom it had informational

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[21] *Accord United States v. Russell*, 804 F.2d 571, 576 (9th Cir. 1986) (Ferguson, J., concurring) (in *Dahlstrom*, prosecution of defendants who "counseled" preparation of "false or fraudulent documents" violated First Amendment because government "failed to prove incitement of imminent unlawful action"); *United States v. Schulman*, 817 F.2d 1355, 1359 (9th Cir. 1987) (distinguishing *Dahlstrom* from cases in which defendant is an actual participant in fraudulent tax shelter program); *United States v. Solomon*, 825 F.2d 1292, 1297 (9th Cir. 1987) (finding defendants "did far more than merely advocate the creation of patent tax shelters . . . they actively performed all of the organizational and managerial tasks necessary to create and operate the tax shelters"); *see also United States v. Damon*, 676 F.2d 1060, 1062 (5th Cir. 1982) (incorporating into 26 U.S.C. § 7206(2), criminalizing the aiding or assisting in preparation of fraudulent tax return, a requirement limiting application of statute to "speech which incites imminent lawless activity") (quoting *Brandenburg*); *United States v. Holecek*, 739 F.2d 331, 335 (8th Cir. 1984) (*Brandenburg* applies where defendant only "advocate[s] through speech violation of the tax laws," but not where defendant participates in "the actual preparation of the returns").

The Fourth Circuit's reliance on *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982), is misplaced. *See* App. 22a-23a. The only First Amendment issue before the court in *Barnett* was the defendant's bald claim that, because his activities were limited to providing information, the Constitution absolutely prohibited his prosecu-

value unrelated to the commission of imminent unlawful acts. *Compare United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978) (applying *Brandenburg* to prosecution for aiding and abetting filing of fraudulent tax returns) *with United States v. Mendelsohn*, 896 F.2d at 1185 (*Brandenburg* inapplicable because there was no "evidence that the defendants' speech was informational in a manner removed from immediate connection to the commission of a specific criminal act" or that purchasers of computer program would use it "for anything other than illegal bookmaking").[22] The Fourth Circuit's contrary declaration, *i.e.*, that speech is *per se* unprotected by the First Amendment when it "aids and abets" and therefore becomes "an integral part of the crime," App. 21a, finds no support in these cases, which implicitly recognize that such pronouncements are not self-defining and are thus susceptible to becoming instruments for the kind of *ad hoc* balancing that characterizes the decision below.[23]

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tion. That the Ninth Circuit rejected this "specious syllogism" does not purport to speak to the relevant constitutional distinction articulated in *Freeman*, *Dahlstrom* and, more recently, in *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990), which properly affords the protection of *Brandenburg* upon a showing—which Barnett did not endeavor to make—that the speech at issue was "informational in a manner removed from immediate connection to the commission of a specific criminal act." *Id.* at 1185.

[22] *See also Bond v. Floyd*, 385 U.S. 116, 133-34 (1966) (expression encouraging draft resistance could not, "consistently with the First Amendment," form the basis of a criminal prosecution pursuant to statute punishing any person who " 'counsels, aids, or abets another to refuse or evade registration' ") (quoting 50 U.S.C. § 462(a)); *NOW, Inc. v. Scheidler*, 897 F. Supp. 1047, 1087-88 (N.D. Ill. 1997) (First Amendment protects instructional manual "outlining methods" for interfering with access to abortion clinics because "[e]ncouraging activity which was not immediately followed by violence is protected by the First Amendment").

[23] *See Denver Area Educ. Telecommunications Consortium v. FCC*, 116 S. Ct. 2374, 2406 (1996) (Kennedy, J., concurring in part):

Brandenburg has also been consistently applied by other appellate courts to protect from civil liability a broad spectrum of works disseminated to a mass audience that allegedly caused third parties to commit, or otherwise assisted them in committing, violent or illegal acts.[24] None of these cases involved the kind of "abstract advocacy" to which the Fourth Circuit has purported to limit the reach of *Brandenburg* and none of them looked to the subjective intent of the defendant in determining the scope of First Amendment protection.

> [T]he creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence. Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day.

[24] *See, e.g., Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (wrongful death action by father of boy slain by person who had just seen the film *The Warriors*, which depicted scenes of gang violence, dismissed despite fact that perpetrator uttered a line from the film while committing the homicide); *McCollum v. CBS Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988) (Ozzy Ozbourne record that included song "Suicide Solution," which exhorted suicide, not actionable); *DeFilippo v. NBC, Inc.*, 446 A.2d 1036 (R.I. 1982) (parents could not maintain claim for death of son who hung himself imitating a stunt he had seen performed on *The Tonight Show*); *Olivia N. v. NBC, Inc.*, 178 Cal. Rptr. 888 (Ct. App. 1981) (young woman raped with bottle by teenage girls imitating similar incident depicted on television drama, *Born Innocent*, could not state valid cause of action); *Smith v. Linn*, 587 A.2d 309 (Pa. 1991) ("how-to" diet book did not "incite" reader who followed its instructions and died as a result); *Walt Disney Prods., Inc. v. Shannon*, 276 S.E.2d 580, 583 (Ga. 1981) (broadcaster not liable for injuries caused to child who followed televised instructions concerning how to make sound effects because, "under First Amendment jurisprudence," no liability may attach unless broadcast "presented a clear and present danger that injury would in fact result").

III. THE DECISION BELOW CONFLICTS WITH *THE FLORIDA STAR v. B.J.F.* AND *SMITH v. DAILY MAIL PUBLISHING CO.*

All of the information contained in *Hit Man*, including the specific "instructions" that Perry allegedly followed, is widely available to the public from a variety of other sources including books, films, magazine articles, and news reports. *See* pp. 7-9 *supra*. There is, moreover, no allegation or evidence indicating that *any* of the information contained in the book was gathered by Paladin illegally. Accordingly, the Fourth Circuit's decision that Paladin may nevertheless be held liable in damages for disseminating such information to a mass audience is inconsistent with this Court's decisions in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979).

In those cases, this Court strongly suggested that the First Amendment precludes the imposition of sanctions, including civil damages, "for the publication of true, lawfully-obtained information" to an undifferentiated mass audience where, as here, "the information is already in the public domain," at least where the expression at issue does not fall within a recognized category of unprotected speech such as "incitement to imminent lawless action." DOJR, App. 191a-92a. As the Justice Department has recognized, "[w]here similar or equivalent information is widely available elsewhere," this Court "has been unwilling to find that a restriction on publication of that information is 'narrowly tailored' to address a state interest" or that any " 'meaningful public interest' can be served by further restriction under such circumstances." App. 192a (quoting *The Florida Star v. B.J.F.*, 491 U.S. at 535).

This observation, ignored by the Court of Appeals, is certainly correct. In *The Florida Star* and *Daily Mail*, albeit in the context of governmental efforts to protect personal privacy, this Court concluded that, "once the truthful information [is] 'publicly revealed' or 'in the public domain,' " its further dissemination could not constitu-

tionally be the subject of civil liability. *The Florida Star v. B.J.F.*, 491 U.S. at 535 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. at 103). In the face of these decisions, as the Department of Justice has noted, "it is hard to imagine that the First Amendment would permit culpability or liability for publication" of works disseminated to a mass, undifferentiated audience, which contain information that has "a propensity to be misused by some unknown, unidentified segment of the readership, since sources of the same information inevitably will remain in the public domain, readily available to persons who wish" to misuse it. App. 193a.[25] In this case, however, the Court of Appeals has purported to do just that: impose civil liability on a publisher who has disseminated lawfully obtained information, widely available in the public domain, to a mass audience of undifferentiated readers whether or not it otherwise incites imminent lawless conduct.

IV. THE DECISION BELOW DECIDES AN EXTRAORDINARILY IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT AT THIS TIME

The Court of Appeals' reformulation of *Brandenburg* will expose to civil liability a broad range of expression that has heretofore enjoyed constitutional protection. Moreover, as the DOJR's detailed examination of the district court's opinion in this very case illustrates, App. 181a-83a, 210a-12a, the Fourth Circuit's subsequent decision is similarly destined to influence ongoing congressional efforts to criminalize the dissemination of expression that may prove useful to criminals. Thus, if the decision below is not reversed, an imposing collection of

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[25] *See also Oklahoma Publ'g Co. v. District Ct.*, 430 U.S. 308, 311-12 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 595-96 (1976) (Brennan, J., concurring) (where information is "already in the public domain," this Court has "foreclosed any serious contention that further disclosure of such information can be suppressed before publication or even punished after publication").

books, magazines, films, and other expression will, for the first time, become the proper subject of criminal prosecution, civil liability, and legislative ban.

The Fourth Circuit's contrary assertion is based on its view that this case is "unique in the law" because "the contexts in which" virtually all other works describe or depict unlawful acts "will themselves negate a purpose on the part of the producer or publisher to assist others in their undertaking of the described or depicted conduct." App. 69a. As the Justice Department has acknowledged, however, a publisher's assertion of an innocent purpose "would only raise, rather than resolve, the critical question of fact regarding a publisher's intent; it would remain an issue for the trier of fact to determine whether one of the publisher's purposes was to facilitate criminal conduct." App. 209a-10a. With all due respect, therefore, the Court of Appeals is demonstrably incorrect when it suggests that a jury issue of "intent" will be raised "[i]n only the rarest case." App. 68a. As the fiction writers who have supported Paladin as *amici curiae* have emphasized:

> Paladin stipulated to facts known by all contemporary writers and publishers . . . . Information is used and abused by the disturbed, disaffected and dangerous elements of our society. . . . [P]ublishers and writers of mass-marketed works thus know that their texts may and will be used by criminal and would-be criminals to plan and execute crimes.

Brief *Amicus Curiae* of Horror Writers Ass'n, 4th Cir. No. 96-2612, at 3 (filed Jan. 15, 1997).

Under analogous circumstances, therefore, a jury can be expected to infer that the novels of Tom Clancy and Steven King, the films of Francis Ford Coppola and Alfred Hitchcock, and newspaper, television and magazine reports describing how the Oklahoma City and Pan Am 103 tragedies unfolded were all "purposefully" and "intentionally" disseminated to an audience that their pub-

lishers knew to a virtual certainty included persons who would misuse such information "upon receipt" for unlawful purposes. In such cases, a plaintiff's assertion of a defendant's culpable "intent"—coupled with evidence concerning a particularly heinous crime or sympathetic victim —will inevitably "allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988). *See* DOJR, App. 215a-17a.[26]

In advising Congress concerning the constitutionally permissible scope of legislation in this context, the Justice Department has frankly acknowledged, in a manner the decision below does not, that "[t]he government generally may not, except in rare circumstances, punish persons *either* for advocating lawless action *or* for disseminating truthful information—including information that would be dangerous if used—that such persons have obtained lawfully." App. 146a (emphasis added). Thus, although the Justice Department endeavors to identify narrowly circumscribed instances in which information useful to would-be criminals forfeits its First Amendment protection, the DOJR recognizes that the constitutionality of an "intent"-based standard is at best "uncertain," App. 215a-17a, and emphatically does not endorse the radical reformulation of this Court's decision in *Brandenburg*

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[26] This phenomenon, Paladin respectfully submits, mirrors what has unfolded in this case. In the context of an undeniably horrendous criminal act, the Court of Appeals has found it remarkably easy to declare *Hit Man* to be "a murder manual, pure and simple," App. 62a, a "finding" that ignores much of the book's contents, *see* pp. 5-7 *supra*, not to mention the parties' *stipulation* that *Hit Man* has in fact been disseminated to a mass, undifferentiated audience of 13,000 people who purchased it for a variety of lawful purposes. App. 16a n.2; J.A. 58-62. If a panel of appellate judges can cast aside stipulated facts in this manner, then a jury confronted with disputed facts and asked to assess a defendant's "purpose" will have a powerful incentive to punish expression, albeit with the best of intentions.

conceived by the Fourth Circuit. App. 146a. Nevertheless, the rule embraced by the Fourth Circuit now threatens to serve as an alternative blueprint for national legislation that places in jeopardy too much speech that law-abiding citizens are constitutionally entitled to receive.

Finally, the importance of the issues raised by this Petition is not diminished because proceedings in the district court have not yet run their course. Beyond the fact that the constitutional issues adjudicated by the Fourth Circuit implicate the right of all citizens to receive information,[27] the presentation of such issues for consideration by this Court is, if anything, sharpened by the manner in which they were brought before and resolved by the courts below. Specifically, the parties' Joint Statement of Facts, together with the additional undisputed facts placed in evidence by Paladin and the contents of the book itself, provide this Court with an unusually pristine record upon which to perform its independent review and base its constitutional judgment.

The parties' joint decision to contest these constitutional issues at the outset of the case was designed precisely to "avoid[] making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). That principle counsels as well that this Court review the decision below now and thereby prevent the "chilling effect upon the exercise of First Amendment rights" of speakers throughout the nation that will inevitably result "from the fact

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[27] *See Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997) (statute that prohibits speech because of harm it may cause to some in audience, *e.g.*, minors, unconstitutionally deprives others, *e.g.*, adults, of their right to receive same information); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *American Communications Ass'n v. Douds*, 339 U.S. 382, 395 (1950) ("Under the First Amendment, the public has a right to every man's views" and "[g]overnment may cut him off only when his views . . . threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself.").

of the [ongoing] prosecution" of this publisher. *Id.* *See Anderson v. Liberty Lobby, Inc.*, 471 U.S. 1134 (1985) (granting *certiorari* when court of appeals reversed summary judgment for defendant in libel action); *Cox Broadcasting Corp. v. Cohn*, 415 U.S. 912 (1974) (granting *certiorari* when state supreme court remands case for trial on cause of action prohibited by First Amendment).

CONCLUSION

For the foregoing reasons, Paladin respectfully requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2412

VIVIAN RICE, Guardian and next friend of Tamielle Horn; MARILYN FARMER, Co-personal representatives of the estate of Mildred Horn; TIFFANI M. HORN, Co-personal representatives of the estate of Mildred Horn; MICHAEL D. SAUNDERS, Individually and next friend of Colin D. Saunders, a minor and personal representative of the estate of Janice Y. Saunders; COLIN D. SAUNDERS; JANICE Y. SAUNDERS,

Plaintiffs-Appellants,

v.

THE PALADIN ENTERPRISES, INCORPORATED, a/k/a The Paladin Press,

Defendant-Appellee,

and

PETER C. LUND,

Defendant,

DAVID CRUMP, Professor of Constitutional Law and Recipient of "Friend of the First Amendment" Award; NATIONAL VICTIM CENTER; STEPHANIE ROPER FOUNDATION, INCORPORATED; VICTIMS RIGHTS POLITICAL ACTION COMMITTEE; THE HORROR WRITERS ASSOCIATION; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITOL AREA;

AMERICAN CIVIL LIBERTIES UNION OF COLORADO; ABC, INCORPORATED; AMERICAN ONLINE, INCORPORATED; ASSOCIATION OF AMERICAN PUBLISHERS; THE BALTIMORE SUN COMPANY; E.W. SCRIPPS COMPANY; FREEDOM TO READ FOUNDATION; MAGAZINE PUBLISHERS OF AMERICA, INCORPORATED; MCCLATCHY NEWSPAPERS, INCORPORATED; MEDIA GENERAL, INC.; MEDIA PROFESSIONAL INSURANCE; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSPAPERS ASSOCIATION OF AMERICA; THE NEW YORK TIMES; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; THE WASHINGTON POST,
Amici Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Alexander Williams, Jr., District Judge
(CA-95-3811-AW)

Argued: May 7, 1997
Decided: November 10, 1997

Before WILKINS, LUTTIG, and WILLIAMS,
Circuit Judges.

OPINION

LUTTIG, Circuit Judge:

To Those Who Think,
To Those Who Do,
To Those Who Succeed,
Success is nothing more than taking advantage
of an opportunity.

A WOMAN RECENTLY ASKED HOW I could, in good conscience, write an instruction book on murder.

"How can you live with yourself if someone uses what you write to go out and take a human life?" she whined.

I am afraid she was quite offended by my answer.

It is my opinion that the professional hit man fills a need in society and is, at times, the only alternative for "personal" justice. Moreover, if my advice and the proven methods in this book are followed, certainly no one will ever know.

[A]lmost every man harbors a fantasy of living the life of Mack Bolan or some other fictional hero who kills for fun and profit. They dream of living by their reflexes, of doing whatever is necessary without regard to moral or legal restrictions. But few have the courage or knowledge to make that dream a reality.

You *might be like my friends—interested but unsure, standing on the sidelines afraid to play the game because you don't know the rules. [But] within the pages of this book you will learn one of the most successful methods of operation used by an independent contractor. You will follow the procedures of a man who works alone, without backing of organized crime or on a personal vendetta. Step by step you will be taken from research to equipment selection to job preparation to successful job completion. You will learn where to find employment, how much to charge, and what you can, and* cannot, *do with the money you earn.*

But deny your urge to skip about, looking for the "good" parts. Start where any amateur who is serious about turning professional will start—at the beginning.

[And when] [y]ou've read all the suggested material, you [will have] honed your mind, body and reflexes into a precision piece of professional machinery. You [will have] assembled the necessary tools and learned to use

them efficiently. Your knowledge of dealing death [will have] increased to the point where you have a choice of methods. Finally, you [will be] confident and competent enough to accept employment.

[When you go to commit the murder, you will need] several (at least four or five pairs) of flesh-tone, tight-fitting surgical gloves. If these are not available, rubber gloves can be purchased at a reasonable price in the prescription department of most drug stores in boxes of 100. You will wear the gloves when you assemble and disassemble your weapons as well as on the actual job. Because the metal gun parts cause the rubber to wear quickly, it is a good practice to change and dispose of worn gloves several times during each operation.

[The bag you take to the kill also] should contain a few pairs of cheap handcuffs, usually available at pawn shops or army surplus stores.

Dress, as well as disguises, should be coordinated according to the job setting.

Black, dark brown or olive green clothess do not stand out and will probably appear at first glance to be a mechanic or delivery driver's uniform. . . . And underneath, you can wear your street clothes for a quick change after the job is completed.

The kill is the easiest part of the job. People kill one another every day. It takes no great effort to pull a trigger or plunge a knife. It is being able to do so in a manner that will not link yourself or your employer to the crime that makes you a professional.

. .[If you decide to kill your victim with a knife,] [t]he knife . . . should have a six-inch blade with a serrated edge for making efficient, quiet kills.

The knife should have a double-edged blade. This double edge, combined with the serrated section and six-inch length, will insure a deep, ragged tear, and the

wound will be difficult, if not impossible, to close without prompt medical attention.

Make your thrusts to a vital organ and twist the knife before you withdraw it. If you hit bone, you will have to file the blade to remove the marks left on the metal when it struck the victim's bone.

Using your six inch, serrated blade knife, stab deeply into the side of the victim's neck and push the knife forward in a forceful movement. This method will half decapitate the victim, cutting both his main arteries and wind pipe, ensuring immediate death.

[You might also use an ice pick to murder your victim.] . . . An ice pick can . . . be driven into the victim's brain, through the ear, after he has been subdued. The wound hardly bleeds at all, and death is sometimes attributed to natural causes.

[If you plan to kill your victim with a gun,] you will learn [on the following pages] how to make, without need of special engineering ability or expensive machine shop tools, a silencer of the highest quality and effectiveness. The finished product attached to your 22 will be no louder than the noise made by a pellet gun. Because it is so inexpensive [mine cost less than twenty dollars to make], you can easily dispose of it after job use without any great loss. . . . Your first silencer will require possibly two days total to assemble . . . as you carefully follow the directions step by step. After you make a couple, it will become so easy, so routine, that you can whip one up in just a few hours.

The following items should be assembled before you begin [to build your silencer]:

—Drill rod, 7/32 inch (order from a machine shop if not obtainable locally)

—One foot of 1½ inch (inside diameter) PVC tubing and two end caps

—One quart of fiberglass resin with hardener

One yard thin fiberglass mat

[*List continues*]

[*If you plan to kill your victim with a gun,*] [*c*]*lose kills are by far preferred to shots fired over a long distance. You will need to know beyond any doubt that the desired result has been achieved.*

When using a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. You will not want to be at point-blank range to avoid having the victim's blood splatter you or your clothing. At least three shots should be fired to ensure quick and sure death.

[*If you plan to kill your victim from a distance,*] *use a rifle with a good scope and silencer and aim for the head—preferably the eye sockets if you are a sharpshooter. Many people have been shot repeatedly, even in the head, and survived to tell about it.*

The rifle has a ridge on top that will easily accept a scope, even though it is not cut for one. Put the scope in place, tighten it down, then sight it in. After sighting in, scratch a mark behind each scope clamp to allow remounting of the scope without resighting each time.

Extra clips are a must for both the rifle and pistol and should be carried as a precautionary measure. Hollowpoint bullets are recommended because they deform on impact, making them nontraceable. As an added precaution, you can fill the hollows with liquid poison to insure success of your operations. . . . [*Details follow*]

To test your guns and ammunition, set up a sheet of quarter-inch plywood at distances of two to seven yards maximum for your pistol, and twenty to sixty yards maximum for your rifle. Check for penetration of bullets at each range. Quarter-inch plywood is only a little stronger than the human skull.

If the serial number is on the barrel of the gun, grinding deeply enough to remove it may weaken the barrel to the point that the gun could explode in your face when fired. To make these numbers untraceable, [instructions follow].

[After shooting your victim] run a [specified tool] down the bore of the gun to change the ballistic markings. Do this even though you intend to discard the crime weapon. . . . If, for some reason, you just can't bear to part with your weapon . . . alter the [specified parts of the gun according to the directions that follow].

Although several shots fired in succession offer quick and relatively humane death to the victim, there are instances when other methods of extermination are called for. The employer may want you to gather certain information from the mark before you do away with him. At other times, the assignment may call for torture or disfigurement as a "lesson" for the survivors.

There is no end to the various ways of torturing a mark until he would tell you what you want to know, and die just to get it over. Sometimes all it takes is putting a knife to his throat. Not from behind with the blade across the throat the way they do in the movies, but from the front with the tip of the blade creasing the soft hollow of the throat, where the victim can see the gleaming steel and realizes what damage it would do if fully penetrated.

The only time I can think of that explosives might be in order is when several marks will be together in one place at the same time, and you might be able to get them all with one shot. Notice that I stressed the word might. *Shrapnel doesn't always kill. So in the aftermath, it will be your responsibility to enter the area and make sure that the desired result was accomplished.*

[If you plan to kill your victim with a fertilizer bomb,] purchase a fifty pound bag of regular garden fertilizer from your garden center [and follow these detailed in-

structions for constructing the bomb]. *Extend the fuse and light . . . .*

Arson is a good method for covering a kill or creating an "accident."

Don't ever use gasoline or other traceable materials to start your fire. [*Specified substance*] *is your best starter because it burns away all traces.*

[*In order to dispose of a corpse,*] *you can simply cut off the head after burying the body. Take the head to some deserted location, place a stick of dynamite in the mouth, and blow the telltale dentition to smithereens! After this, authorities can't use the victim's dental records to identify his remains. As the body decomposes, fingerprints will disappear and no real evidence will be left from which to make positive identification. You can even clip off the fingertips and bury them separately.*

[*Or*] *you can always cut the body into sections and pack it into an ice chest for transport and disposal at various spots around the countryside.*

If you choose to sink the corpse, you must first make several deep stabs into the body's lungs (from just under the rib cage) and belly. This is necessary because gases released during decomposition will bloat these organs, causing the body to rise to the surface of the water.

The corpse should be weighted with the standard concrete blocks, but it must be wrapped from head to toe with heavy chains as well, to keep the body from separating and floating in chunks to the surface. After the fishes and natural elements have done their work, the chain will drag the bones into the muddy sediment. . . .

If you bury the body, again deep stab wounds should be made to allow the gases to escape. A bloating corpse will push the earth up as it swells. Pour in lime to prevent the horrible odor of decomposition, and lye to make that decomposition more rapid.

[*After you killed your first victim,*] *you felt* absolutely nothing. *And you are shocked by the nothingness. You had expected this moment to be a spectacular point in your life. You had wondered if you would feel compassion for the victim, immediate guilt, or even experience direct intervention by the hand of God. But you weren't even feeling sickened by the sight of the body.*

After you have arrived home the events that took place take on a dreamlike quality. You don't dwell on them. You don't worry. You don't have nightmares. You don't fear ghosts. When thoughts of the hit go through your mind, it's almost as though you are recalling some show you saw on television.

By the time you collect the balance of your contract fee, the doubts and fears of discovery have faded. Those feelings have been replaced by cockiness, a feeling of superiority, a new independence and self-assurance.

[*E*]*verything seems to have changed.*

The people around you have suddenly become so aggravatingly ordinary. *You start to view them as an irritating herd of pathetic sheep, doing as they are told, doing what is expected, following someone, anyone, blindly. You can't believe how dumb your friends have become, and your respect diminishes for people you once held in awe.*

You too have become different. You recognize that you made some mistakes, but you know what they were, and they will never plague you again. Next time (and you know there will be a next time), there will be no hesitation, no fear.

Your experience in facing death head-on has taught you about life. You have the power and ability to stand alone. You no longer need a reason to kill.

The things you have learned about life are important. You may wish to pass on your observations to someone

you care about. When the bullshit starts to flow, you may feel compelled to set the record straight and tell those morons how it really is. When someone starts to brag, in confidence, about something he's done, the intimacy of the moment, the shared confessions, may inspire you to do a little bragging of your own. Or you may want to overawe some new woman in your life with your masculinity and you feel the urge to shock her just a little by hinting at your true profession.

Start now in learning to control your ego. That means, above all, keeping your mouth shut! *You are a man. Without a doubt, you have proved it. You have come face to face with death and emerged the victor through your cunning and expertise. You have dealt death as a professional. You don't need any second or third opinions to verify your manhood.*

Then, some day, when you've done and seen it all: when there doesn't seem to be any challenge left or any new frontier left to conquer, you might just feel cocky enough to write a book about it.

Selected passages from *Hit Man: A Technical Manual for Independent Contractors.*[1]

I.

On the night of March 3, 1993, readied by these instructions and steeled by these seductive adjurations from *Hit Man: A Technical Manual for Independent Contractors*, a copy of which was subsequently found in his

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[1] The foregoing passages have been selected by the court as representative, both in substance and presentation, of the instructions in *Hit Man.* These are but a small fraction of the total number of instructions that appear in the 130-page manual. And the court has even felt it necessary to omit portions of these few illustrative passages in order to minimize the danger to the public from their repetition herein.

apartment, James Perry brutally murdered Mildred Horn, her eight-year-old quadriplegic son Trevor, and Trevor's nurse, Janice Saunders, by shooting Mildred Horn and Saunders through the eyes and by strangling Trevor Horn, Perry's despicable crime was not one of vengeance; he did not know any of his victims. Nor did he commit the murders in the course of another offense. Perry acted instead as a contract killer, a "hit man," hired by Mildred Horn's ex-husband, Lawrence Horn, to murder Horn's family so that Horn would receive the $2 million that his eight-year-old son had received in settlement for injuries that had previously left him paralyzed for life. At the time of the murders, this money was held in trust for the benefit of Trevor, and, under the terms of the trust instrument, the trust money was to be distributed tax-free to Lawrence in the event of Mildred's and Trevor's deaths.

In soliciting, preparing for, and committing these murders, Perry meticulously followed countless of *Hit Man*'s 130 pages of detailed factual instructions on how to murder and to become a professional killer.

Perry, for example, followed many of the book's instructions on soliciting a client and arranging for a contract murder in his solicitation of and negotiation with Lawrence Horn. Cautioning against the placement of advertisement in military or gun magazines, as this might prompt "a personal visit from the FBI," *Hit Man* instructs that "as a beginner" one should solicit business "through a personal acquaintance whom you trust." *Hit Man* at 87. James Perry offered his services as a professional killer to Lawrence Horn through Thomas Turner, a "good friend" of Perry's, and Lawrence Horn's first cousin. *State* v. *Perry*, 344 Md. 204, 686 A.2d 274, 278 (1996), *cert. denied*, 117 S. Ct. 1318 (1997).

Hit Man instructs to request "expense money" from the employer prior to committing the crime, advising the contract killer to get "*all expense money up front.*" *Hit Man* at 92 (emphasis added). The manual goes on to explain

that this amount should generally range from five hundred to five thousand dollars, "depending on the type of job and the job location," and that the advance should be paid in cash. *Id.* Prior to commission of the murders, Lawrence Horn paid James Perry three thousand five hundred dollars through a series of wire transfers using phony names. *Perry*, 686 A.2d at 280.

Hit Man instucts that the victim's personal residence is the "initial choice" location for a murder and "an ideal place to make a hit," depending on its "layout" and "position." *Hit Man* at 81-82. James Perry murdered the Horns at their place of residence. *Perry*, 686 A.2d at 277.

Hit Man instructs its readers to use a rental car to reach the victim's location, *Hit Man* at 98, and to "steal an out-of-state tag" and use it to "replace the rental tag" on the car, explaining that "[s]tolen tags only show up on the police computer of the state in which they are stolen." *Id.* James Perry stole out-of-state tags and affixed them to his rental car before driving it to the Horns' residence on the night of the murders. *Perry*, 686 A.2d at 276.

Hit Man instructs the reader to establish a base at a motel in close proximity to the "jobsite" before committing the murders. *Hit Man* at 101. On the night that he killed Mildred and Trevor Horn and Janice Saunders, James Perry took a room at a Days Inn motel in Rockville, Maryland, a short drive from the Horns' residence. *Perry*, 686 A.2d at 276.

Hit Man instructs that one should "use a made-up [license] tag number" when registering at the motel or hotel. *Hit Man* at 102. James Perry gave a false license tag number when he registered at the Days Inn on the night of the murders. *Perry*, 686 A.2d at 276.

Hit Man instructs that a "beginner" should use an AR-7 rifle to kill his victims. *Hit Man* at 21. James Perry used an AR-7 rifle to slay Mildren Horn and Janice Saunders. *Perry*, 686 A.2d at 279.

Hit Man instructs its readers where to find the serial numbers on an AR-7 rifle, and instructs them that, prior to using the weapon, they should "completely drill[] out" these serial numbers so that the weapon cannot be traced. *Hit Man* at 23. James Perry drilled out the serial numbers of his weapon exactly as the book instructs. *Perry*, 686 A.2d at 280.

Hit Man instructs in "explicit detail" (replete with photographs) how to construct, "without [the] need of special engineering ability or machine shop tools," a homemade, "whisper-quiet" silencer from material available in any hardware store. *Hit Man* at 39-51. James Perry constructed such a homemade silencer and used it on the night that he murdered Mildred and Trevor Horn and Janice Saunders. J.A. at 24.

Perry also followed any number of *Hit Man*'s instructions on how to commit the murder itself. The manual, for example, instructs its readers to kill their "mark" at close range, so that they will "know beyond any doubt that the desired result has been achieved." *Hit Man* at 24. The book also cautions, however, that the killer should not shoot the victim at point blank range, because "the victim's blood [will] splatter [the killer] or [his] clothing." *Id.* Ultimately, the book recommends that its readers "shoot [their victims] from a distance of three to six feet." *Id.* James Perry shot Milded Horn and Janice Saunders from a distance of three feet. J.A. at 24.

Hit Man specifically instructs its audience of killers to shoot the victim through the eyes if possible:

> At least three shots should be fired to insure quick and sure death. . . . [A]im for the head—preferably the eye sockets if you are a sharpshooter.

Hit Man at 24. James Perry shot Mildred Horn and Janice Saunders two or three times and through the eyes. *Perry*, 686 A.2d at 277.

Finally, Perry followed many of *Hit Man*'s instructions for concealing his murders. *Hit Man* instructs the killer to "[p]ick up those empty cartridges that were ejected when you fired your gun." *Hit Man* at 104. Although Perry fired his rifle numerous times during the murders, no spent cartridges were found in the area. *Compare Perry*, 686 A.2d at 277, *with id.* at 280.

Hit Man instructs the killer to disguise the contract murder as burglary by "mess[ing] the place up a bit and tak-[ing] anything of value that you can carry concealed." *Hit Man* at 104. After killing Mildred and Trevor Horn and Janice Saunders, James Perry took a Gucci watch, as well as some credit cards and bank cards from Mildred Horn's wallet. *Perry*, 686 A.2d at 278. According to the police report, a few areas of the Horns' residence appeared "disturbed" or "slightly tossed," and "a rug and cocktail table in the living room had been moved." *Id.* at 277.

Hit Man instructs that, after murdering the victims, the killer should break down the AR-7 in order to make the weapon easier to conceal. *Hit Man* at 105. James Perry disassembled his weapon after the murders, in accordance with the instructions in *Hit Man*. *Perry*, 686 A.2d at 280.

Hit Man instructs killers to use specified tools to alter specified parts of the rifle. *Hit Man* at 25. The author explains that the described alterations will prevent the police laboratory from matching the bullets recovered from the victims' bodies to the murder weapon. James Perry altered his AR-7 in accordance with these instructions. *Perry*, 686 A.2d at 280.

Hit Man also instructs the killer to dispose of the murder weapon by scattering the disassembled pieces of the weapon along the road as he leaves the crime scene. *Hit Man* at 105. And, after killing Mildred and Trevor Horn and Janice Saunders, Perry scattered the pieces of his dis-

assembled AR-7 rifle along Route 28 in Montgomery County. *Perry*, 686 A.2d at 280.

In this civil, state-law wrongful death action against defendant Paladin Enterprises—the publisher of *Hit Man* —the relatives and representatives of Mildred and Trevor Horn and Janice Saunders allege that Paladin aided and abetted Perry in the commission of his murders through its publication of *Hit Man*'s killing instructions. For reasons that are here of no concern to the court, Paladin has *stipulated* to a set of facts which establish as a matter of law that the publisher is civilly liable for aiding and abetting James Perry in his triple murder, unless the First Amendment absolutely bars the imposition of liability upon a publisher for assisting in the commission of criminal acts. As the parties stipulate: "The parties agree that the sole issue to be decided by the Court . . . is whether the First Amendment is a complete defense, as a matter of law, to the civil action set forth in the plaintiffs' Complaint. All other issues of law and fact are specifically reserved for subsequent proceedings." J.A. at 58.

Paladin, for example, has stipulated for purposes of summary judgment that Perry followed the above-enumerated instructions from *Hit Man*, as well as instructions from another Paladin publication, *How to Make a Disposable Silencer, Vol. II*, in planning, executing, and attempting to cover up the murders of Mildred and Trevor Horn and Janice Saunders. J.A. at 61. Paladin has stipulated not only that, in marketing *Hit Man*, Paladin "intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes," J.A. at 59, but also that it "intended *and* had knowledge" that *Hit Man* actually "would be used, *upon receipt*, by criminals and would-be criminals to plan and execute the crime of murder for hire." J.A. at 59 (emphasis added). Indeed, the publisher has even stipulated that, through publishing and selling *Hit Man*, it assisted Perry in particular in the perpetration of the very

murders for which the victims' families now attempt to hold Paladin civilly liable. J.A. at 61.[2]

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[2] The full fact stipulation of the parties read as follows:

JOINT STATEMENT OF FACTS

The parties agree that the matters set forth below represent facts that the plaintiffs and/or defendants would be able to establish by affidavit or otherwise in the context of defendants' motion for summary judgment under F.R.C.P. 56. These facts are offered only for the purposes of this motion and the parties specifically reserve the right to contest all statements which follow at any subsequent proceeding in this case. The parties agree that the sole issue to be decided by the Court in this motion is whether the First Amendment is a complete defense, as a matter of law, to the civil action set forth in the plaintiffs' Complaint. All other issues of law and fact are specifically reserved for subsequent proceedings.

1. Prior to March 3, 1993, Lawrence Horn began plotting with James Perry of Detroit, Michigan, to have Perry murder his ex-wife, Mildred Horn, and his son, Trevor.

2. On or about January 24, 1992, James Perry responded to a catalogue solicitation by the defendant, Paladin, advertising *Hit Man: A Technical Manual for Independent Contractors* (hereinafter referred to as "*Hit Man*"), and *How to Make a Disposable Silencer, Volume 2* (hereinafter referred to as "*Silencers*"). Perry ordered both publications. *Hit Man and Silencers* were mailed to him by the defendants shortly thereafter.

3. Defendants had no other known contact with Perry and no contacts with Lawrence Horn.

4. Defendants concede, for purposes of this motion, and for no other purposes, that:

a. defendants engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes; and

b. in publishing, marketing, advertising and distributing *Hit Man* and *Silencers*, defendants intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications.

c. The conditional factual concessions made in this ¶ 4 relate only to the defendants' state of mind, and do not preclude defendants from contending that defendants' published words, in

Notwithstanding Paladin's extraordinary stipulations that it not only knew that its instructions might be used

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and of themselves, were neither directed at causing imminent unlawful action nor likely to produce such action, for purposes of the doctrine of *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

5. Plaintiffs concede, for purposes of this motion and for no other purposes, that:

a. defendants' marketing strategy was and is intended to maximize sales of its publications to the public, including sales to (i) authors who desire information for the purpose of writing books about crime and criminals, (ii) law enforcement officers and agencies who desire information concerning the means and methods of committing crimes, (iii) persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment, (iv) persons who fantasize about committing crimes but do not thereafter commit them, and (v) criminologists and others who study criminal methods and mentality.

b. in publishing, marketing, advertising and distributing *Hit Man* and *Silencers*, as well as other publications, defendants intended and had knowledge that their publications would be purchased by members of the general public, including those persons and for those purposes listed in ¶ 5(a).

c. The conditional factual concessions made in this ¶ 5 shall not preclude the plaintiffs from contending that such facts are irrelevant to any issue before this court.

6. On March 3, 1993, James Perry traveled from Detroit, Michigan to Montgomery County, Maryland and murdered Mildred Horn, Trevor Horn, and Janice Saunders, Trevor's private duty nurse. Perry followed a number of instructions outlined in *Hit Man* and *Silencers* (set forth in ¶ 7 below) in planning, executing and attempting to get away with the murders described in the complaint.

7. Defendants concede, for the purpose of this motion and for no other purposes, that in publishing, distributing and selling *Hit Man* and *Silencers* to Perry, defendants assisted him in the subsequent perpetration of the murders which are the subject of this litigation, in the ways set forth in paragraphs 18 and 19 of the Rice complaint and paragraphs 20 and 21 of the Saunders complaint which are incorporated by reference and are filed herewith as exhibit "D".

8. *Hit Man* was first published in 1983 and *Silencers* was first published in 1983. Approximately 13,000 copies of *Hit*

by murderers, but that it actually *intended* to provide assistance to murderers and would-be murderers which would be used by them "upon receipt," and that it in fact assisted Perry in particular in the commission of the murders of Mildred and Trevor Horn and Janice Saunders, the district court granted Paladin's motion for summary judgment and dismissed plaintiffs' claims that Paladin aided and abetted Perry, holding that these claims were barred by the First Amendment as a matter of law.

Because long-established caselaw provides that speech—even speech by the press—that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment, and because we are convinced that such caselaw is both correct and equally applicable to speech that constitutes civil aiding and abetting of criminal conduct (at least where, as here, the defendant has the specific purpose of assisting and encouraging commission of such conduct and the alleged assistance and encouragement takes a form other than abstract advocacy), we hold, as urged by the Attorney General and the Department of Justice, that the First Amendment does not pose a bar to a finding that Paladin is civilly liable as an aider and abetter of Perry's triple contract murder. We also hold

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Man and an unknown but not disproportionate number of copies of *Silencers* have been sold nationally.

9. At all relevant times, defendants had no specific knowledge (1) that either Perry or Horn planned to commit a crime; (2) that Perry and Horn had entered into a conspiracy for the purpose of committing a crime; and (3) that Perry had been retained by Horn to murder Mildred Horn, Trevor Horn, or Janice Saunders.

10. The defendants' current catalogue, and publications *Hit Man* and *Silencers* are filed herewith by the parties as exhibits A, B, and C, respectively.

11. The parties may file affidavits or supplement but not alter the foregoing stipulation. Plaintiffs reserve the right to challenge defendants' affidavits declarations with counter-affidavits or pursuant to F.R.C.P. 56.

J.A. at 58-62.

that the plaintiffs have stated against Paladin a civil aiding and abetting claim under Maryland law sufficient to withstand Paladin's motion for summary judgment. For these reasons, which we fully explain below, the district court's grant of summary judgment in Paladin's favor is reversed and the case is remanded for trial.

II.

A.

In the seminal case of *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), the Supreme Court held that abstract advocacy of lawlessness is protected speech under the First Amendment. Although the Court provided little explanation for this holding in its brief *per curiam* opinion, it is evident the Court recognized from our own history that such a right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty. Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.

However, while even speech advocating lawlessness has long enjoyed protections under the First Amendment, it is equally well established that speech, which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct, may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes. *Cf. Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991) (noting "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). As no less a First Amendment absolutist than Justice Black

wrote for the Supreme Court almost fifty years ago in *Giboney* v. *Empire Storage & Ice Co.*, in rejecting a First Amendment challenge to an injunction forbidding unionized distributors from picketing to force an illegal business arrangement:

> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. . . .
>
> . . .
>
> . . . It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

336 U.S. 490, 498, 502 (1949) (citations omitted). And as the Court more recently reaffirmed:

> Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech. [W]hile a solicitation to enter into an agreement arguably crosses the sometimes hazy line dis-

> tinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited.

Brown v. *Hartlage*, 456 U.S. 45, 55 (1982); *see also Osborne* v. *Ohio*, 495 U.S. 103, 110 (1990) (quoting *Giboney*, 336 U.S. at 498); *New York* v. *Ferber*, 458 U.S. 747, 761-62 (1982) (same); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (quoting *Giboney*, 336 U.S. at 502); *National Organization for Women* v. *Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) ("That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality"); *United States* v. *Varani*, 435 F.2d 758, 762 (6th Cir. 1970) ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself."); Laurence H. Tribe, *American Constitutional Law* 837 (2d ed. 1988) ("[T]he law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of old Volkswagen parts.").

Were the First Amendment to bar or to limit government regulation of such "speech brigaded with action," *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring), the government would be powerless to protect the public from countless of even the most pernicious criminal acts and civil wrongs. *See, e.g.*, Model Penal Code § 223.4 (extortion or blackmail); *id.* § 240.2 (threats and other improper influences in official and political matters); *id.* § 241 (perjury and various cognate crimes); *id.* § 5.02 and § 2.06(3)(a)(i) (criminal solicitation); 18 U.S.C. § 871 (threatening the life of the President); Model Penal Code § 5.03 (conspiracy); *id.* § 250.4 (harassment); *id.* § 224.1 (forgery); *id.* § 210.5(2) (successfully soliciting another to commit suicide); *id.* § 250.3 (false public

alarms); and the like. As Professor Greenawalt succinctly summarized:

> The reasons of ordinary penal policy for covering communicative efforts to carry out ordinary crimes are obvious, and the criminal law sensibly draws no distinction between communicative and other acts. Although assertions of fact generally fall within a principle of freedom of speech, what these sorts of factual statements contribute to the general understanding of listeners is minimal, and the justifications for free speech that apply to speakers do not reach communications that are simply means to get a crime successfully committed.

Greenawalt, *Speech, Crime, and the Uses of Language* at 85 (1989).

In particular as it concerns the instant case, the speech-act doctrine has long been invoked to sustain convictions for aiding and abetting the commission of criminal offenses. Indeed, *every* court that has addressed the issue, including this court, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.

Thus, in a case indistinguishable in principle from that before us, the Ninth Circuit expressly held in *United States* v. *Barnett*, 667 F.2d 835 (9th Cir. 1982), that the First Amendment does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs. In rejecting the publisher's argument that there could be no probable cause to believe that a crime had been committed because its actions were shielded by the First Amendment, and thus *a fortiori* there was no probable cause to support the search pursuant to which the drug manufacturing instructions were found, the Court of Appeals explicitly foreclosed a First Amendment defense not only to the search itself, but also to a later prosecution:

> To the extent . . . that Barnett appears to contend that he is immune from search or *prosecution* because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct.

Id. at 843 (emphasis in original); *see also id.* at 842 ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction."). The Ninth Circuit derided as a "specious syllogism" with "no support in the law" the publisher's argument that the First Amendment protected his sale of the instruction manual simply because the First Amendment protects the written word. *Id.* at 842.

The principle of *Barnett*, that the provision of instructions that aid and abet another in the commission of a criminal offense is unprotected by the First Amendment, has been uniformly accepted, and the principle has been applied to the aiding and abetting of innumerable crimes.

Notably, then-Judge Kennedy, in express reliance upon *Barnett*, invoked the principle in *United States* v. *Freeman* to sustain convictions for the aiding and abetting of tax fraud. 761 F.2d 549, 552-53 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986). In *Freeman*, the Ninth Circuit concluded that the defendant could be held criminally liable for counseling tax evasion at seminars held in protest of the tax laws, even though the speech that served as the predicate for the conviction "spr[ang] from the anterior motive to effect political or social change." 761 F.2d at 551. Said the court:

> [T]he First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a

> substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone.

Id. at 552 (citations omitted). Thus, the court held that a First Amendment instruction was required only for those counts as to which there was evidence that the speaker "directed his comments at the unfairness of the tax laws generally, without soliciting or counseling a violation of the law in an immediate sense [and] made statements that, at least arguably, were of abstract generality, remote from advice to commit a specific criminal act." Id. at 551-52. For those counts as to which the defendant, through his speech, directly assisted in the preparation and review of false tax returns, the court held that the defendant was not entitled to a First Amendment instruction at all. *Id.* at 552. *See also United States* v. *Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding *Brandenburg* inapplicable to a conviction for conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia, where defendants disseminated a computer program that assisted others to record and analyze bets on sporting events; program was "too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection").

Our own circuit, and every other circuit to address the issue, has likewise concluded that the First Amendment is generally inapplicable to charges of aiding and abetting violations of the tax laws. *See, e.g., United States* v. *Kelley*, 769 F.2d 215 (4th Cir. 1985); *United States* v. *Rowlee*, 899 F.2d 1275 (2d Cir. 1990), *cert. denied*, 498 U.S. 828 (1990); *United States* v. *Moss*, 604 F.2d 569 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); *United States* v. *Buttorff*, 572 F.2d 619, 623-24 (8th Cir. 1978) (holding that tax evasion speeches were not subject to *Brandenburg* because, although they did not "incite the type of imminent lawless activity referred to in criminal

syndicalism cases," they did "go beyond mere advocacy of tax reform"), *cert. denied*, 437 U.S. 906 (1978).

Thus, in *Kelley*, we held that a defendant who "participate[d]" in the preparation of false tax forms for others by telling listeners "what to do and how to prepare the forms" and by supplying forms and materials was not entitled to the protections of the First Amendment, 769 F.2d at 217, even though the defendant offered his advice in a meeting of a group concededly dedicated to the political belief "that the federal income tax is unconstitutional as applied to wages," *id.* at 216. We observed, as the Ninth Circuit did with respect to the claim made in *Barnett*, that,

> [t]he claim of First Amendment protection of [Kelley's] speech is frivolous. His was no abstract criticism of income tax laws. His listeners were not urged to seek congressional action to exempt wages from income taxation. Instead, they were urged to file false returns, with every expectation that the advice would be heeded.
>
> The cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law. *Brandenburg* v. *Ohio*, 395 U.S. 444, 89 S. Ct. 1827; *United States* v. *Buttorff*, 572 F.2d 619 (8th Cir. 1978). It was no theoretical discussion of non-compliance with laws; action was urged; the advice was heeded, and false forms were filed.

Kelley, 769 F.2d at 217. Analogously, we held in *United States* v. *Fleschner*, 98 F.3d 155 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2484 (1997), that defendants who instructed and advised meeting attendees to file unlawful tax returns were not entitled to a First Amendment jury instruction on the charge of conspiracy to defraud the United States of income tax revenue because "[t]he defendants' words and acts were not remote from the commission of the criminal acts." 98 F.3d at 158-59.

Indeed, as the Department of Justice recently advised Congress, the law is now well established that the First Amendment, and *Brandenburg*'s "imminence" requirement in particular, generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because "culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes." Department of Justice, "Report on the Availability of Bombmaking Information, the Extent to Which Its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution" 37 (April 1997) (footnote omitted) [*hereinafter* "DOJ Report"]; *see also id.* ("[T]he question of whether criminal conduct is 'imminent' is relevant for constitutional purposes only where, as in *Brandenburg* itself, the government attempts to restrict advocacy, as such.").[3]

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[3] Congress, in the Antiterrorism and Effective Death Penalty Act of 1996 ["the AEDPA"], Pub. L. No. 104-132, 110 Stat. 1214, 1297, required the Attorney General to conduct a study concerning, *inter alia*, the extent to which there is available public access to materials instructing on "how to make bombs, destructive devices, or weapons of mass destruction"; the application of then-existing federal laws to such materials; and the extent to which the First Amendment protects such materials and their private and commercial distribution. The statutory mandate to the Attorney General was prompted by legislation proposed by Senators Feinstein and Biden in the aftermath of the Oklahoma City bombing, which would criminalize the teaching or demonstration of the manufacture of explosive materials "if the person intends or knows that such explosive materials or information will likely be used for, or in furtherance of" specified criminal offenses.

The AEDPA required the Attorney General to submit to the Congress a report on these subjects and to make that report available to the public. Recognizing that the exhaustive legal analysis set forth in that report was directly relevant to the issues pending before us, the parties jointly moved for, and we granted them, permission to file the report with the court. The decision we reach today, which, as noted, was urged upon us by Attorney General

And, while there is considerably less authority on the subject, we assume that those speech acts which the government may criminally prosecute with little or no concern for the First Amendment, the government may likewise subject to civil penalty or make subject to private causes of action. *Compare Garrison* v. *Louisiana*, 379 U.S. 64 (1964) (applying the same "actual malice" standard to both criminal libel prosecutions and private defamation actions) *with New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *Cf. Cohen*, 501 U.S. 663 (finding in civil promissory estoppel case that First Amendment does not bar liability for newspaper's publication of confidential source's name); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (First Amendment does not bar liability for common law tort of unlawful appropriation of "right to publicity" where television station broadcast "human cannonball" act in its entirety without plaintiff's authorization); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985) (rejecting First Amendment defense to copyright infringement action against magazine for printing unauthorized presidential

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Reno and the Department of Justice, follows from the principal conclusion reached by the Attorney General and the Department in that report:

> The First Amendment would impose substantial constraints on any attempt to proscribe indiscriminately the dissemination of bombmaking information. The government generally may not, except in rare circumstances, punish persons either for advocating lawless action or for disseminating truthful information—including information that would be dangerous if used—that such persons have obtained lawfully. *However, the constitutional analysis is quite different where the government punishes speech that is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit; such "speech acts"—for instance, many cases of inchoate crimes such as aiding and abetting and conspiracy—may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such "conduct" takes the form of speech.*

DOJ Report at 2 (emphasis added).

memoir excerpts). Even if this is not universally so, we believe it must be true at least where the government's interest in preventing the particular conduct at issue is incontrovertibly compelling.

B.

We can envision only two possible qualifications to these general rules, neither of which, for reasons that we discuss more extensively below, is of special moment in the context of the particular aiding and abetting case before us.

1.

The first, which obviously would have practical import principally in the civil context, is that the First Amendment may, at least in certain circumstances, superimpose upon the speech-act doctrine a heightened intent requirement in order that preeminent values underlying that constitutional provision not be imperiled. *See, e.g., New York Times*, 376 U.S. 254; *cf. United States* v. *Aguilar*, 515 U.S. 593, 605 (1995) (rejecting defendant's First Amendment construction in part because "the statute here in question does *not* impose such a restriction [on the disclosure of wiretap authorizations] generally, but only upon those who disclose wiretap information '*in order to* [ob]struct, impede, or prevent' a wiretap interception" (emphasis added)); *Haig* v. *Agee*, 453 U.S. 280, 308-09 (1981) ("[The defendant's] disclosures, among other things, have the *declared purpose* of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution." (emphasis added)); *United States* v. *Featherston*, 461 F.2d 1119, 1122 (5th Cir. 1972) (rejecting First Amendment challenge to federal statute criminalizing the teaching or demonstration of the making of any explosive device after construing statute to require "intent or knowledge that the information disseminated would be used in the furtherance of a civil disorder"), *cert. denied*, 409 U.S. 991 (1972); *National Mobilization Committee to*

End the War in Viet Nam v. *Foran*, 411 F.2d 934, 937 (7th Cir. 1969). That is, in order to prevent the punishment or even the chilling of entirely innocent, lawfully useful speech, the First Amendment may in some contexts stand as a bar to the imposition of liability on the basis of mere foreseeability or knowledge that the information one imparts could be misused for an impermissible purpose. Where it is necessary, such a limitation would meet the quite legitimate, if not compelling, concern of those who publish, broadcast, or distribute to large, undifferentiated audiences, that the exposure to suit under lesser standards would be intolerable. *See* discussion *infra*. Part IV. At the same time, it would not relieve from liability those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment. Like our sister circuits, at the very least where a speaker—individual or media—acts with the purpose of assisting in the commission of crime, we do not believe that the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience. *See, e.g., Barnett*, 667 F.2d 835 (holding that drug manufacturing instructions mailed to countless customers with whom the defendant had no personal contact could give rise to aiding and abetting conviction); *Mendelsohn*, 896 F.2d 1183 (holding that First Amendment did not forbid prosecution of aiding and abetting interstate transportation of wagering paraphernalia where computer programs for recording and analyzing illegal wagers were distributed generally and widely to the public); *Buttorff*, 572 F.2d at 622-23 (affirming, despite First Amendment challenges, convictions for providing tax-evasion information at "large public gatherings" to participants whom the defendants did not personally meet); *Kelley*, 769 F.2d 215 (similar); *Moss*, 604 F.2d 569 (similar); *Freeman*, 761 F.2d 549 (similar). This is certainly so, we are satisfied, where not only the speaker's dissemination or marketing

strategy, but the nature of the speech itself, strongly suggest that the audience both targeted and actually reached is, in actuality, very narrowly confined, as in the case before us. *See* discussion *infra* at 39-44. Were the First Amendment to offer protection even in these circumstances, one could publish, by traditional means or even on the internet, the necessary plans and instructions for assassinating the President, for poisoning a city's water supply, for blowing up a skyscraper or public building, or for similar acts of terror and mass destruction, with the specific, indeed even the admitted, purpose of assisting such crimes—all with impunity.

We need not engage in an extended discussion of the existence or scope of an intent-based limitation today, however, because we are confident that the First Amendment poses no bar to the imposition of civil (or criminal) liability for speech acts which the plaintiff (or the prosecution) can establish were undertaken with specific, if not criminal, intent. *See* DOJ Report at 42-43 (advising that "the government may punish publication of dangerous instructional information where that publication is motivated by a desire to facilitate the unlawful [conduct as to which the instructions inform, or] [a]t the very least, publication with such an improper intent should not be constitutionally protected where it is foreseeable that the publication will be used for criminal purposes . . . ."). In fact, this conclusion would seem to follow *a fortiori* from the Supreme Court's holding in *New York Times*, 376 U.S. 254, allowing the imposition of civil tort liability on a media defendant for reputational injury caused by mere reckless disregard of the truth of its published statements. And here, as previously noted, *see also* discussion *infra* at 37-38, Paladin has stipulated that it provided its assistance to Perry with *both* the knowledge *and* the intent that the book would immediately be used by criminals and would-be criminals in the solicitation, planning, and commission of murder and murder for hire, and even absent the stipulations, a jury could reasonably find such specific

intent, *see* discussion *infra* at 38-42. Thus, Paladin has stipulated to an intent, and a jury could otherwise reasonably find that Paladin acted with a kind and degree of intent, that would satisfy any heightened standard that might be required by the First Amendment prerequisite to the imposition of liability for aiding and abetting through speech conduct.[4]

2.

The second qualification is that the First Amendment might well (and presumably would) interpose the same or similar limitations upon the imposition of civil liability for abstract advocacy, without more, that it interposes upon the imposition of criminal punishment for such advocacy. In other words, the First Amendment might well circumscribe the power of the state to create and enforce a cause of action that would permit the imposition of civil liability, such as aiding and abetting civil liability, for speech that would constitute pure abstract advocacy, at least if that speech were not "directed to inciting or producing imminent lawless action, and . . . likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447. The instances in which such advocacy might give rise to civil liability under state statute would seem rare, but they are not inconceivable. *Cf. Schenck* v. *United States*, 249 U.S. 47 (1919) (criminal conspiracy prosecution predicated upon subversive advocacy); *Frohwerk* v. *United States*, 249 U.S. 204 (1919) (same); *Debs* v. *United States*, 249 U.S. 211 (1919) (criminal attempt prosecution predicated upon such advocacy). Again, however, an exhaustive analysis of this likely limitation is not required in this case.

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[4] In addition to their aiding and abetting counts, which require that Paladin have acted knowingly or intentionally, the plaintiffs also brought claims sounding *inter alia* in negligence and strict liability. The district court did not address these claims and we do not do so herein. We leave to the district court on remand the task of addressing these counts in the first instance.

Here, it is alleged, and a jury could reasonably find, *see* discussion *infra* Part III.A, that Paladin aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder (replete with photographs, diagrams, and narration) so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in the preparation and planning, but in the actual commission of, and follow-up to, the murder; there is not even a hint that the aid was provided in the form of speech that might constitute abstract advocacy. As the district court itself concluded, *Hit Man* "merely teaches what must be done to implement a professional hit." J.A. at 218. Moreover, although we do not believe such would be necessary, we are satisfied a jury could readily find that the provided instructions not only have no, or virtually no, noninstructional communicative value, but also that their only instructional communicative "value" is the indisputably illegitimate one of training persons how to murder and to engage in the business of murder for hire. *See id.; see also id.* at 221 ("This Court, quite candidly, personally finds *Hit Man* to be reprehensible and devoid of any significant redeeming social value").

Aid and assistance in the form of this kind of speech bears no resemblance to the "theoretical advocacy." *Scales* v. *United States*, 367 U.S. 203, 235 (1961), the advocacy of "principles divorced from action," *Yates* v. *United States*, 354 U.S. 298, 320 (1957), *overruled on other grounds, Burks* v. *United States*, 437 U.S. 1 (1978), the "doctrinal justification," *id.* at 321, "the mere abstract teaching [of] the moral propriety or even moral necessity for a resort to force and violence," *Brandenburg*, 395 U.S. at 448 (*quoting Noto* v. *United States*, 367 U.S. 290, 297-98 (1961)), or any of the other forms of discourse critical of government, its policies, and its leaders, which have always animated, and to this day continue to animate, the First Amendment. Indeed, this detailed, focused instructional assistance to those contemplating or

in the throes of planning murder is the antithesis of speech protected under *Brandenburg*. It is the teaching of the "techniques" of violence, *Scales*, 367 U.S. at 233, the "advocacy and teaching of concrete action." *Yates*, 354 U.S. at 320, the "prepar[ation] . . . for violent action and [the] steeling . . . to such action," *Brandenburg*, 395 U.S. at 448 (*quoting Noto*, 367 U.S. at 297-98). It is the instruction in the methods of terror of which Justice Douglas spoke in *Dennis* v. *United States*, when he said, "If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage . . . I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror . . . should be beyond the pale . . . ." 341 U.S. 494, 581 (1951) (Douglas, J., dissenting). As such, the murder instructions in *Hit Man* are, collectively, a textbook example of the type of speech that the Supreme Court has quite purposely left unprotected, and the prosecution of which, criminally or civilly, has historically been thought subject to few, if any, First Amendment constraints. Accordingly, we hold that the First Amendment does not pose a bar to the plaintiffs' civil aiding and abetting cause of action against Paladin Press. If, as precedent uniformly confirms, the states have the power to regulate speech that aids and abets crime, then certainly they have the power to regulate the speech at issue here.

III.

The district court's contrary conclusion, reached in an initial and then an amended opinion, must be attributed ultimately, we believe, to that court's failure at the time of its initial ruling to realize that Maryland does recognize a civil cause of action for aiding and abetting. Once the court's error with respect to the existence in Maryland of a civil aiding and abetting cause of action was brought to the court's attention by the parties on motion for reconsideration, it appears that the court was simply unprepared to revisit its decision, issued only the week before, in order to address the above-discussed cases,

which the district court itself had observed are "factually similar" to the case at hand, J.A. at 156, but which the court had distinguished on the ground that they involved *criminal* prosecutions for aiding and abetting and Maryland does not provide a *civil* cause of action for aiding and abetting. J.A. at 155 ("Plaintiffs are asking the Court to allow the Defendants to be subjected to *civil* liability for murder, based on a theory of civil aiding and abetting —*a claim that does not exist under Maryland law*." (emphasis added)). Perhaps ironically, this unwillingness foreordained what was, as we explain below, the district court's second error in the interpretation of Maryland law —its holding, on reconsideration, that Maryland would not recognize aiding and abetting liability under the facts as stipulated by the parties to this litigation, or on the facts as they appear from the record.

Whatever doubts the district court may have harbored about its interpretation of Maryland aiding and abetting law were almost certainly eased because it concluded alternatively (albeit in *dicta*) that *Hit Man* is entitled to the protections of *Brandenburg* in any event because it is a mere instructional manual for, and not an incitement to, murder. However, in this conclusion the district court erred as well, misunderstanding the Supreme Court's decision in *Brandenburg* to protect not just abstract advocacy of lawlessness and the open criticism of government and its institutions, but also the teaching of the technical methods of criminal activity—in this case, the technical methods of murder.

A.

In its initial memorandum opinion, the district court rejected the plaintiffs' principal argument, that the First Amendment does not bar the imposition of liability for the aiding and abetting of murder, on the ground that the State of Maryland does not recognize a civil cause of action for aiding and abetting:

> Plaintiffs argue that *Hit Man* is not protected by the First Amendment because the First Amendment does not protect communication aiding and abetting murder. This argument must fail, however, because Plaintiffs do not cite, nor has the Court located, any reported decision that suggests that Maryland recognizes the tort of aiding and abetting. A federal court sitting in diversity cannot create new causes of action. Therefore, the Court cannot create a cause of action for aiding and abetting under Maryland law . . . .

J.A. at 153-54 (footnote and citations omitted). In response to submissions by both parties filed the very next day informing the court that Maryland does recognize civil aiding and abetting, the district court was obliged to amend its memorandum opinion to acknowledge the overwhelming authority that Maryland does, in fact, recognize such a cause of action. However, rather than address then the numerous precedents holding that the First Amendment offers little protection against claims of aiding and abetting criminal conduct, which in its initial opinion the court had agreed were similar to the instant case, the district court thereafter merely added to its original memorandum opinion the single conclusory footnote sentence (together with the necessary conforming changes to the relevant paragraph from its initial opinion [5]) that,

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[5] Thus, in relevant part, the amended opinion reads as follows:

> Plaintiffs argue that *Hit Man* is not protected by the First Amendment because the First Amendment does not protect communication aiding and abetting murder. This argument, the Court believes, fails, however, because of the absence of any reported decision suggesting that Maryland *extends* the tort of aiding and abetting to the circumstances of this case. A federal court sitting in diversity cannot create new causes of action. Therefore, the Court cannot *apply a new theory or extend the tort of aiding and abetting* under Maryland law . . . .

J.A. at 205-06 (footnote and citations omitted; emphases added). As evidence of the haste with which the revised analysis was undertaken, the amended opinion elsewhere still includes a statement of

"[a]lthough Maryland appears to recognize aider and abetter tort liability, it has never been applied to support liability in this context." J.A. at 205 n.2 (internal citation deleted).[6] In this holding, as with its original holding that Maryland did not recognize a cause of action for civil aiding and abetting, the district court erred.

Mayland's highest court has held that a defendant may be liable in tort if he "by any means (words, signs, or motions) encourage[s], incite[s], aid[s] or abet[s] the act of the direct perpetrator of the tort." *Alleco Inc.* v. *Harry & Jeanette Weinberg Foundation*, 340 Md. 176, 665 A.2d 1038, 1049 (1995) (*quoting Duke* v. *Feldman*, 245 Md. 454, 226 A.2d 345, 347 (1967)). It further appears that generally Maryland defines the tort of aiding and abetting in the same way that it defines the crime of aiding and abetting. The state defines "aider" as one who "assist[s], support[s] or supplement[s] the efforts of another," and defines "abettor" as "one who instigates, advises or encourages the commission of a crime." *Anello* v. *State*, 201 Md. 164, 93 A.2d 71, 72-73 (Md. 1952). The Court of Appeals has explained that in order for a conviction tc stand, "it is not essential that there be a prearranged concert of action, although, in the absence of such action, it is essential that [the defendant] should in some way advocate or encourage the commission of the

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the district court's initial conclusion that Maryland does not provide a civil cause of action for aiding and abetting. *See id.* at 207 ("Plaintiffs are asking the Court to allow the Defendants to be subjected to civil liability for murder, based on a theory of civil aiding and abetting—a claim that does not exist under Maryland law.").

[6] The issue of whether, under the stipulated facts, Paladin could be held liable for aiding and abetting under Maryland law was not even before the district court. In fact, the parties had expressly stipulated that "[t]he parties agree that the sole issue to be decided by the Court in this motion is whether the First Amendment is a complete defense, as a matter of law, to the civil action set forth in the plaintiffs' Complaint. All other issues of law and fact are specifically reserved for subsequent proceedings." J.A. 58-59.

crime." *Id.* And, recently, the court has reiterated that criminal aiding and abetting "may be predicated upon counseling or encouraging" a criminal act, even if there is no agreement between the principal and the aider or abettor, and also that "[i]t is well settled that aiding and abetting does not always require a conspiracy." *Apostoledes* v. *State*, 323 Md. 456, 593 A.2d 1117, 1121 (1991).

The primary, and possibly only, difference between Maryland's civil and criminal laws of aiding and abetting is the intent requirement. As Judge Learned Hand explained in discussing generally the difference between civil and criminal aiding and abetting laws, the intent standard in the civil tort context requires only that the criminal conduct be the "natural consequence of [one's] original act," whereas criminal intent to aid and abet requires that the defendant have a "purposive attitude" toward the commission of the offense. *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938); *see also Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) (adopting Judge Hand's view of the criminal intent requirement). We assume that Maryland prescribes a higher intent standard for the imposition of criminal liability than it does for civil liability.

Especially in light of the caselaw discussed above, we are satisfied not only that the Maryland courts would conclude that an aiding and abetting cause of action would lie in the circumstances of this case, but also that plaintiffs have, by way of stipulation and otherwise, established a genuine issue of material fact as to each element of that cause of action. Perhaps most importantly in this regard, we conclude that plaintiffs have more than met their burden of establishing a genuine issue of material fact as to Paladin's intent, even assuming that the First Amendment erects a heightened standard from that required under Maryland state law.

Paladin itself has stipulated that "Perry followed a number of instructions outlined in *Hit Man*" in preparing for and in murdering Mildred and Trevor Horn and Janice Saunders. J.A. at 61. In fact, as noted, the publisher has actually stipulated that it assisted Perry in the "perpetration of the murders." *Id.*

Even without these express stipulations of assistance, however, a reasonable jury could conclude that Paladin assisted Perry in those murders, from the facts that Perry purchased and possessed *Hit Man* and that the methods and tactics he employed in his murders of Mildred and Trevor Horn and Janice Saunders so closely paralleled those prescribed in the book. As discussed above, *see* discussion *supra* Part I, Perry followed, in painstaking detail, countless of the book's instructions in soliciting, preparing for, and carrying out his murders. Without repeating these in detail here, Perry faithfully followed the book's instructions in making a home-made silencer, using a rental car with stolen out-of-state tags, murdering the victims in their own home, using an AR-7 rifle to shoot the victims in the eyes from point blank range, and concealing his involvement in the murders. The number and extent of these parallels to the instructions in *Hit Man* cannot be consigned, as a matter of law, to mere coincidence; the correspondence of techniques at least creates a jury issue as to whether the book provided substantial assistance, if it does not conclusively establish such assistance.

A jury likewise could reasonably find that Perry was encouraged in his murderous acts by Paladin's book. *Hit Man* does not merely detail how to commit murder and murder for hire; through powerful prose in the second person and imperative voice, it encourages its readers in their specific acts of murder. It reassures those contemplating the crime that they may proceed with their plans without fear of either personal failure or punishment. And at every point where the would-be murderer might yield either to reason or to reservations, *Hit Man* emboldens the killer, confirming not only that he should

proceed, but that he must proceed, if he is to establish his manhood. *See* discussion *infra* at 54-56. The book is so effectively written that its protagonist seems actually to be present at the planning, commission, and cover-up of the murders the book inspires. Illustrative of the nature and duration of the criminal partnership established between *Hit Man* and its readers who murder is the following "dialogue" that takes place when the murderer returns from his first killing:

> I'm sure your emotions have run full scale over the past few days or weeks.
>
> There was a fleeting moment just before you pulled the trigger when you wondered if lighting would strike you then and there. And afterwards, a short burst of panic as you looked quickly around you to make sure no witnesses were lurking.
>
> But other than that, you felt *absolutely nothing*. And you are shocked by that nothingness. You had expected this moment to be a spectacular point in your life. . . .
>
> The first few seconds of nothingness give you an almost uncontrollable urge to laugh out loud. You break into a wide grin. Everything you have been taught about life and its value was a fallacy.

Hit Man at 107. As this and other cases reveal, the book is arrestingly effective in the accomplishment of its objectives of counseling others to murder and assisting them in its commission and cover-up.

Finally, and significantly, Paladin also has stipulated to an intent that readily satisfies that required under Maryland law or the First Amendment. Even if the First Amendment imposes a heightened intent-based limitation on the state's ability to apply the tort of aiding and abetting to speech, *see* discussion *supra* at II.B.1, we are confident that, at the very least, the aiding and abetting of a *malum in se* crime such as murder with the specific pur-

pose of assisting and encouraging another or others in that crime would satisfy such a limitation. Paladin has stipulated not only that it had knowledge that its publication would be used upon receipt by murderers and other criminals in the commission of murder, but that it even intended that the book be so used. Thus, the publisher stipulated, "defendants intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire." J.A. at 59. Paladin has even stipulated that it "engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes." *Id.* These stipulations are more than sufficient to foreclose an absolute First Amendment defense to plaintiffs' suit. *See* DOJ Report at 43 & 44-45 n.71 ("[W]e believe that the district court in *Rice* v. *Paladin* erred insofar as it concluded that *Brandenburg* bars liability for dissemination of [instructions on murder] *regardless* of the publisher's intent. . . . [Defendant Paladin's] concession[s] would, for purposes of summary judgment, seem to foreclose a constitutional defense . . .").

The district court was never required to consider the intent requirement under Maryland's law of aiding and abetting, much less whether the First Amendment imposes a heightened intent standard in the context of authorizing liability for speech acts, because of its mistaken conclusion that Maryland does not recognize a civil cause of action for aiding and abetting. In analogizing this case to the copycat cases (and seemingly in order to permit the analogy), however, the district court accepted Paladin's *post hoc* "clarification" that it meant by its stipulation only that it was reasonably foreseeable to the publisher that, once the book was published and publicly available, it would be used by murderers to plan and to commit murder. Thus, in accepting the defendants' belated clarification, the district court said:

> Defendants conceded that they intended that their publications would be used by criminals to plan and execute murder as instructed in the manual. . . . However, Defendants clarify their concession by explaining that when they published, advertised and distributed both *Hit Man* and *Silencers*, they knew, and in that sense "intended," that the books would be purchased by all of the categories of readers previously described and used by them for the broad range of purposes previously described.

J.A. at 215-16 (citations omitted). Of course, the district court was without authority to allow Paladin to alter the parties' stipulation unilaterally, particularly given that Paladin was the party moving for summary judgment. If anything, the stipulation should have been, and in any event must now be, interpreted in the light most favorable to the plaintiffs.

Furthermore, even if the stipulation only established knowledge, summary judgment was yet inappropriate because a trier of fact could still conclude that Paladin acted with the requisite intent to support civil liability. Wholly apart from Paladin's stipulations, there are four bases upon which, collectively, if perhaps not individually, a reasonable jury could find that Paladin possessed the intent required under Maryland law, as well as the intent required under any heightened First Amendment standard. *Compare* DOJ Report, at 45 n.71 ("[E]ven assuming *arguendo* that the defendants' own construction of the 'intent' stipulation were correct, that still would not justify the grant of summary judgment, since it would leave *unanswered* the question whether Paladin also had the specific purpose of facilitating murder.").

First, the declared purpose of *Hit Man* itself is to facilitate murder. Consistent with its declared purpose, the book is subtitled "A Technical Manual for Independent Contractors," and it unabashedly describes itself as "an instruction book on murder," *Hit Man* at ix. A jury

need not, but plainly could, conclude from such prominent and unequivocal statements of criminal purpose that the publisher who disseminated the book intended to assist in the achievement of that purpose.

Second, the book's extensive, decided, and pointed promotion of murder is highly probative of the publisher's intent, and may be considered as such, whether or not that promotion, standing alone, could serve as the basis for liability consistent with the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); *cf. Noto*, 367 U.S. at 299.[7] After carefully and repeatedly reading *Hit Man* in its entirety, we are of the view that the book so overtly promotes murder in concrete, nonabstract terms that we regard as disturbingly disingenuous both Paladin's cavalier suggestion that the book is essentially a comic book whose "fantastical" promotion of murder no one could take seriously, and *amici*'s reckless characterization of the book as "almost avuncular," *see* Br. of *Amici* at 8-9. The unique text of *Hit Man* alone, boldly proselytizing and glamorizing the crime of murder and the "profession" of murder as it dispassionately instructs on its commission, is more than sufficient to create a triable issue of fact as to Paladin's intent in publishing and selling the manual.

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[7] *Cf.* DOJ Report at 30 & n.47 (citations omitted) ("Insofar as publication of [bombmaking] manuals were criminalized on account of those manuals' *advocacy* of unlawful conduct, such a prohibition almost certainly could not pass constitutional muster. The First Amendment would not, however, prohibit the evidentiary use of such advocacy to demonstrate a disseminator's intent in conveying bombmaking *information*. Therefore, insofar as criminal culpability for dissemination of such information depends upon the distributors' intent—for example, upon whether a disseminator of bombmaking manuals had the conscious purpose of helping others to use the information to engage in unlawful conduct—the substance of the advocacy in such manuals could be used as material evidence of such intent.").

Third, Paladin's marketing strategy would more than support a finding of the requisite intent. *Cf. Direct Sales* v. *United States*, 319 U.S. 703, 712-13 (1943) (holding that jury may infer intent to assist a criminal operation based upon a drug distributor's marketing strategy). It is known through Paladin's stipulations that it "engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes." J.A. at 59. But an inference as to such a strategy would be permitted from Paladin's catalogue advertisement of *Hit Man*. The publisher markets the book as follows, invoking a disclaimer which, the district court's characterization notwithstanding, a jury could readily find to be transparent sarcasm designed to intrigue and entice:

> Learn how a pro gets assignments, creates a false identity, makes a disposable silencer, leaves the scene without a trace, watches his mark unobserved and more. Feral reveals how to get in, do the job and get out without getting caught. *For academic study only!*

Paladin Press Catalog, Vol. 26, No. 2 at 41 (emphasis in original). *See also infra* note 10. From this statement by the publisher in its own promotional sales catalogue, a jury could conclude that Paladin marketed *Hit Man* directly and even primarily to murderers and would-be criminals, and, from this permissible conclusion, in turn conclude that Paladin possessed the requisite intent necessary to support liability.

Certainly, such a conclusion would be reasonable based upon this promotional description coupled with the singular character of *Hit Man*, which is so narrowly focused in its subject matter and presentation as to be effectively targeted exclusively to criminals. In other words, despite the fact that Paladin may technically offer the book for sale to all comers, we are satisfied that a jury could, based upon *Hit Man*'s seemingly exclusive purpose to assist mur-

derers in the commission of murder, reasonably conclude that Paladin essentially distributed *Hit Man* only to murderers and would-be murderers—that its conduct was not, at least in law, different from that of a publisher (or anyone else) who delivered *Hit Man* to a specific person or group of persons whom the publisher knew to be interested in murder. And even Paladin effectively concedes that it could be liable were such a finding permissibly made. Paladin's Memorandum in Support of Summary Judgment at 33 n.24.

A conclusion that Paladin directed *Hit Man* to a discrete group rather than to the public at large would be supported, even if not established, by the evidence that *Hit Man* is not generally available or sold to the pubic from the bookshelves of local bookstores, but, rather, is obtainable as a practical matter only by catalogue. Paladin Press is a mail order company, and for the most part does not sell books through retail outlets. In order to procure a copy of *Hit Man*, the prospective reader must first obtain a copy of Paladin's catalogue, typically by completing a request form reprinted in one of Paladin's advertisements in specialized magazines such as *Soldier of Fortune*. After obtaining that catalogue, the reader must scan the list of book titles and read the accompanying descriptions. Once the reader finds the book he desires, he must then complete and mail another form to order the book.

From the requirements of this process, together with the book's character, a jury need not, but could, permissibly find that *Hit Man* is not at all distributed to the general public and that, instead, it is available only to a limited, self-selected group of people interested in learning from and being trained by a self-described professional killer in various methods of killing for money, individuals who are then contemplating or highly susceptible to the commission of murder.

Finally, a jury could reasonably conclude that Paladin specifically intended to assist Perry and similar murderers by finding, contrary to Paladin's demurs, as would we, that *Hit Man*'s only genuine use is the unlawful one of facilitating such murders.[8] *Cf.* J.A. at 221 (observation by district court that *Hit Man* is "devoid of any significant redeeming social value"). Although before us Paladin attempts to hypothesize lawful purposes for *Hit Man*, and it would doubtless advance the same hypotheses before a jury, at some point hypotheses are so implausible as to be deserving of little or no weight. The likelihood that *Hit Man* actually is, or would be, used in the legitimate manners hypothesized by Paladin is sufficiently remote that a jury could quite reasonably reject them altogether as alternative uses for the book. If there is a publication that could be found to have no other use than to facilitate unlawful conduct, then this would be it, so devoid is the book of any political, social, entertainment, or other legitimate discourse. *Cf. Miller* v. *California*, 413 U.S. 15 (1973) (distinguishing obscene from nonobscene material in part on basis of "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value"). Thus, for example, a jury would certainly not be unreasonable in dismissing (in fact, it arguably would be unreasonable in accepting) Paladin's contention that *Hit Man* has significant social value in that the book, in the course of instructing murderers how to murder, incidentally informs law enforcement on the techniques that the book's readers will likely employ in the commission of their murders. Likewise, a reasonable jury could simply refuse to accept Paladin's contention that this purely factual, instructional manual on murder has entertainment

[8] Paladin contends that plaintiffs have stipulated "that the defendant's book has substantial informational value unrelated to the facilitation of crime." Appellee's Br. at 29 (footnote omitted). But they have not; they have stipulated only that Paladin's "marketing strategy" was intended to reach audiences beyond criminals and would-be criminals. J.A. at 60.

value to law-abiding citizens. And, just as a permissible inference as to Paladin's marketing strategy would be supportable by evidence as to the specialized process by which one acquires *Hit Man,* either of these conclusions as to the absence of lawful purpose could be reinforced by the same evidence.

In summary, a reasonable jury clearly could conclude from the stipulations of the parties, and, apart from the stipulations, from the text of *Hit Man* itself and the other facts of record, that Paladin aided and abetted in Perry's triple murder by providing detailed instructions on the techniques of murder and murder for hire with the specific intent of aiding and abetting the commission of these violent crimes.

B.

Any argument that *Hit Man* is abstract advocacy entitling the book, and therefore Paladin, to heightened First Amendment protection under *Brandenburg* is, on its face, untenable. Although the district court erred in its alternative conclusion that the speech of *Hit Man* is protected advocacy, *see* discussion *infra* at III.B.2. even that court expressly found that "the book merely teaches what must be done to implement a professional hit." J.A. at 217-18; *id.* at 218 n.4 (discussing "instructive nature" of book). Indeed, Paladin's protests notwithstanding, this book constitutes the archetypal example of speech which, because it methodically and comprehensively prepares and steels its audience to specific criminal conduct through exhaustively detailed instructions on the planning, commission, and concealment of criminal conduct, finds no preserve in the First Amendment. To the extent that confirmation of this is even needed, given the book's content and declared purpose to be "an instruction book on murder." *Hit Man* at ix, that confirmation is found in the stark contrast between this assassination manual and the speech heretofore held to be deserving of constitutional protection.

1.

Through its stipulation that it intended *Hit Man* to be used by criminals and would-be criminals to commit murder for hire *in accordance with the book's instructions.* Paladin all but concedes that, through those instructions, *Hit Man* prepares and steels its readers to commit the crime of murder for hire. But even absent the publisher's stipulations, it is evident from even a casual examination of the book that the prose of *Hit Man* is at the other end of the continuum from the ideation at the core of the advocacy protected by the First Amendment.

The cover of *Hit Man* states that readers of the book will "[l]earn how a pro makes a living at this craft [of murder] without landing behind bars" and,

> how he gets hit assignments, creates a false working identity, makes a disposable silencer, leaves the scene without a trace of evidence, watches his mark unobserved, and more . . . how to get in, do the job, and get out—without getting caught.

In the first pages of its text, *Hit Man* promises, consistent with its title as "A Technical Manual for Independent Contractors," that the book will prepare the reader, step by step, to commit murder for hire:

> Within the pages of this book you will learn one of the most successful methods of operation used by an independent contractor. You will follow the procedures of a man who works alone, without backing of organized crime or on a personal vendetta. Step by step you will be taken from research to equipment selection to job preparation to successful job completion. You will learn where to find employment, how much to charge, and what you can, and *cannot,* do with the money you earn.
>
> But deny your urge to skip about, looking for the "good" parts. Start where any amateur who is seri-

> ous about turning professional will start—at the beginning.

Hit Man at x-xi (emphasis in original). And, faithful to these promises, in the successive chapters of the 130 pages that follow, *Hit Man* systematically and in meticulous detail instructs on the gruesome particulars of every possible aspect of murder and murder for hire. The manual instructs step-by-step on building and using fertilizer bombs, constructing silencers, picking locks, selecting and using poisons, sinking corpses, and torturing victims. It teaches would-be assassins how to arrive at, and conduct surveillance of, a potential victim's house, and it instructs on the use of a fake driver's license and registration at a motel, the placement of stolen out-of-state license plates on rental cars, and the deception of the postal service into delivering weapons to the murder scene. The book instructs the readers in murder methods, explaining in dispassionate and excruciatingly graphic detail how to shoot, stab, poison, and incinerate people, and in gory detail it expounds on which methods of murder will best ensure the death of the victims. The book schools the reader on how to escape the crime scene without detection, and how to foil police investigations by disassembling and discarding the murder weapon, altering the ballistics markings of that weapon, stealing and switching license plates, and disguising the reader's physical appearance. And it counsels on how to manipulate the legal system, if caught.

At the risk of belaboring the obvious, but in order to appreciate the encyclopedic character of *Hit Man*'s instructions, one need only consider the following chapter-by-chapter synopsis.

Chapter One of *Hit Man*, entitled "The Beginning—Mental and Physical Preparation," starts by outlining the "essential" steps to becoming a professional killer. *Hit Man* at 9. The book urges the reader to read other books from publishers such as Paladin Press, but it cautions that

"[b]ooks on subjects related to the professional hit man are hard to find [and that] there are [only] a few publishers out there who have the backbone to provide those . . . who take life seriously with the necessary educational materials." *Hit Man* at 9-10. The book goes on to recommend that one read articles in magazines such as *Soldier of Fortune,* and military newsletters in order to "[s]tay abreast of new trends and developments [in weapons and techniques of killing] as well as new gadgets and inventions as they become available." *Hit Man* at 9. It also encourages the reader to comb fictional accounts of murder, on the off chance that, for example, "the warped imagination of a fiction writer will point out an obvious but somehow never before realized method of pacification or body disposal." *Id.* at 10. It instructs its readers to study their local newspapers carefully "to see who in your area might be your next employer . . . or victim," and to use the classified advertisements, among other things, to find 'new toys and pick them up from private owners to avoid registering your weapons." *Id.* The book provides in-depth advice on using a variety of publicly available reference materials to locate weapons and other "equipment," gather information about victims, and plan murders for hire. For example, the book instructs its readers to go to the auto tag department of the county courthouse and "[l]ook up the mark by last name or tag number for address," because books containing such information are often "left out for public use." *Id.* at 12. Similary, the book instructs the readers in how to use the postal service to "track[ ] down the last known address of anyone you choose as a function of the Freedom of Information Act," *id.* at 14, and to send weapons safely to the location of a planned murder, *id.* at 13.

In addition, *Hit Man* instructs its readers to become familiar with local law enforcement techniques, for example by obtaining law enforcement handbooks, and it provides practical advice on how to obtain these books, either

from "any college bookstore where law enforcement courses are taught," *id.* at 14, or by theft. The book also offers the readers practical tips on diet, fitness, combat training, ("Veterans with wartime experience and the ability to kill are first choice instructors." *Id.* at 17), and observational skills. Although much of the information in this chapter is not explicit in outlining the methods of terror, it is explicit in advising the would-be assassin where to turn for additional information beyond that found between the covers of the book.

Chapter Two of the book, entitled "Equipment—Selection and Purpose," imparts a wealth of information on the "basic equipment" the "beginner" will need as tools of his trade, *id.* at 21, and provides detailed instructions as to the equipment's use. For example, the book first instructs the reader to obtain, *inter alia*, an AR-7 rifle, hollow-point bullets, disposable silencers, liquid poison, disposable rubber gloves, a double-edged knife with a six-inch blade, handcuffs, and a ski mask. *See id.* at 21-22. The book next provides precise instructions on how to kill, using each of the various weapons. The manual recommends "close kills," and teaches that:

> When using a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. You will not want to be at point-blank range to avoid having the victim's blood splatter you or your clothing. At least three shots should be fired to ensure quick and sure death.
>
> You can judge when death has occurred by observing the wound. When the blood ceases to flow, the heart has stopped working. Check for pulse at both the wrist and throat as an added precaution.

Id. at 24. The book goes on to teach which weapons to avoid and why, explaining, for example, that,

> [a]lthough revolvers are often depicted as being a favorite tool among hit men, they are *not* recom-

> mended by this pro. Revolvers cannot be effectively silenced. The open cylinder allows gases to escape, thus making noise. When fired, gas is forced around the cylinder in a 360 degree circle, thereby throwing powder all over the person who fires the gun.
>
> An automatic, on the other hand, is tightly sealed so that when it is fired almost all the power residue is forced into the silencer, where it is trapped. This prevents the powder from escaping and covering the person who fired the shot. . . . If a shell catcher is used, the powder residue will become trapped inside the catch bag.

Id. at 26. The manual further instructs how to kill efficiently at close-range with a knife:

> The knife you carry should have a six-inch blade with a serrated section for making efficient, quiet kills. . . .
>
> The knife should have a double-edged blade. This double edge, combined with the serrated section and six-inch length, will insure a deep, ragged tear, and the wound will be difficult, if not impossible, to close without prompt medical attention.
>
> Make your thrusts to a vital organ and twist the knife before you withdraw it. If you hit bone, you will have to file the blade to remove the marks left on the metal when it struck the victim's bone.

Id. at 27-28. The book also instructs on alternatives to the close-range kill, including instructions such as the following:

> If you must do your shooting from a distance, use a rifle with a good scope and silencer and aim for the head—preferably the eye sockets if you are a sharpshooter. Many people have been shot repeatedly, even in the head, and survived to tell about it.

Id. at 24. Finally, the chapter includes a host of other instructions on how to use basic tools, ranging from handcuffs, to lock picks, to surveillance equipment, in the commission of murder. For instance, the book teaches the need for a hit man to always wear gloves and it discusses glove choice, recommending surgical gloves because.

> [l]eather gloves are not to be considered as a job tool. The leather has the same individual, distinct characteristics as the human fingerprint. If you have to use leather gloves, destroy them immediately after the job. If found in your possession, they can convict you as quickly as a set of your own fingerprints.

Id. at 27. The chapter continues in like vein.

Chapter Three, entitled "The Disposable Silencer—A Poor Man's Access to a Rich Man's Toy," teaches the reader, with step-by-step instructions and accompanying photographic illustration, how to contruct a "whisper-quiet," "inexpensive," and "effective" disposable silencer that is "reusable for over four hundred rounds." *Id.* at 47, 51. These directions are designed to allow the "amateur" to construct disposable silencers, which, the book explains, are "one of the most important tools a professional will ever have." *Id.* at 38. As the book explains, these "same directions can be followed successfully to construct a silencer for any weapon, with only the size of the drill rod used for alignment changed. . . ." *Id.* at 39.

Hit Man's Chapter Four, entitled "More Than One Way To Kill a Rabbit—The Direct Hit is Not Your Only Alternative," includes discursive instructions on numerous additional methods of killing and torture. If "several marks will be together in one place at the same time," the book teaches, one can kill all of the "marks" with a fertilizer bomb, and it goes on to teach the reader, through step-by-step instructions, how to build such a bomb. *Id.* at 54-55. The chapter teaches the reader how to kill by

arson, admonishing and instructing, "Don't ever use gasoline or other traceable materials to start your fire. [Specified substance] is your best starter because it burns away all traces." *Id.* at 56. In addition, the chapter includes instructions such as that, "[a] fire victim will have smoke present in his lungs. Therefore, if this is your choice of extermination, your mark should be unconscious, but breathing, when the fire is set. Make sure no scratches or bruises point to foul play." *Id.* Later in the chapter, *Hit Man* discusses poisons. After teaching an elaborate method for obtaining hard-to-find poisons through impersonation, the manual explains how one can successfully use substances such as tetrodotoxin, oleander, nicotine, and jessamine to kill his victims. *See id.* at 58-63. The chapter's discussion of torture techniques provides explicit advice on how to inflict sufficient pain to ensure that "people will tell you anything you want to know, even when they are sure they are about to die." *Id.* at 64. In what is offered as a helpful example, the book illustrates from the author's own experience:

> We [the book's author and his accomplice, referred to only as "the Indian"] subdued the [victim], stripped him to the waist and tied him into a wooden chair.
>
> . . .
>
> The Indian pulled an ice pick from his hip pocket.
>
> . . .
>
> . . . Suddenly he stopped and inserted the tip of the pick into the [victim's] upper arm about a quarter of an inch. When he withdrew the pick, there was a sickening little popping sound as blood spurted from the wound for a second, then stopped.
>
> . . .
>
> Several stabs later, the [victim] was quivering like a jellyfish, his body like a pin cushion, while the Indian was getting more and more excited and more and more into his work.

> . . . With a malicious grin, [the Indian] pulled a pair of pliers from his other hip pocket and gave me a sly wink. Pointedly, methodically, he began with the [victim's] little finger on his left hand and crunched each knuckle slowly with the pliers. It seemed to take no effort at all on his part as the soft bone gave way under the force of the simple tool. He had only gotten to the third finger when the [victim] began to cry like a baby and spill his guts.

Id. at 65-66. The chapter concludes with instructions for disposing of human corpses without detection, providing directions for, *inter alia*, hiding the bodies in a river:

> If you choose to sink the corpse, you must first make several deep stabs into the body's lungs (from just under the rib cage) and belly. This is necessary because gases released during decomposition will bloat these organs, causing the body to rise to the surface of the water.
>
> The corpse should be weighted with the standard concrete blocks, but it must be wrapped from head to toe with heavy chain as well, to keep the body from separating and floating in chunks to the surface. After the fishes and natural elements have done their work, the chain will drag the bones into the muddy sediment.

Id. at 67. And the instructions we repeat here are but a few of the methods of inflicting torture and death taught in the chapter.

The next chapter, entitled "Homework and Surveillance —Mapping a Plan and Checking It for Accuracy," instructs on how to obtain information about the victim from the client. It explains the importance of finding out information such as whether the victim has a dog or other pet that might provide a warning of the impending assassination, the layout of the victim's residence, and

whether the victim has roommates or neighbors. The chapter includes a lengthy "sample information sheet" that may be used in planning a first kill. *Id.* at 73-80.

Chapter Six, entitled "Opportunity Knocks—Finding Employment, What to Charge, What to Avoid," teaches readers how to find someone who will hire their services as professional killers. The chapter explains where to find potential employers, what to look for in such persons, and what to charge for each murder.

> Prices vary according to the risk involved, social or political prominence of the victim, difficulty of the assignment, and other factors. A federal judge [Judge Wood, slain in Texas in 1978] recently brought a price of $250,000, for example. A county sheriff might bring $75,000 to $100,000.
>
> . . .
>
> . . . It is not recommended that you take any contract that pays less than $30,000, and that is working mighty cheap. To work for any amount less would be amateurish. . . .
>
> There are two good reasons for setting a $30,000 minimum for your services. First, the risks involved are high. . . . A fee of $5,000 or even $10,000 will be of little consolation as you wait helplessly behind bars.
>
> Second, because the risks are so high and employment opportunities are limited, the money you earn should be sufficient to carry you over until your next job comes along.

Id. at 90-91. The chapter also provides instructions on how to communicate with the employer after the hit, explaining, for example, that it is best to develop a code for informing the employer that the contract has been fulfilled, such as calling the employer's residence and asking to speak with a fictitious individual, whose name signals to the employer that the victim is dead. *See id.* at 93-94.

In the following chapter, titled "Getting the Job Done Right—Why the Described Hit Went Down the Way It Did," *Hit Man* provides instructions for reaching the victim's location, transporting tools, preparing to commit the murder, and cleaning up the crime scene and escaping after the killing. Illustrative of the chapter's directions for preparing to commit the murder:

> Wipe down your weapons as you assemble them. Even the inner parts of your guns must be wiped to remove any prints that were left behind during the last cleaning.
>
> Wipe down each bullet and wear rubber gloves as you load the clip. *Just in case* you leave behind an empty cartridge, you don't want your fingerprint emblazoned on the casing.

Id. at 103. Similarly, the manual instructs on how best to discard the clothes worn to commit the killing:

> The first thing you should do when you reach the car [after killing your victims] is change into another disguise and get out of those work clothes. Check them for bloodstains. If there are none, you can toss them into a charity collection box or trash can. If the victim's blood *is* on those clothes, they must be burned or buried.

Id. at 105. And it explains, with respect to sanitation of the rental car:

> [S]top and wipe the car for prints and wear driving gloves as you return the car to the rental agency. . . . [W]ash the car and vacuum the interior *immediately* when you arrive at your destination [because] foreign soil from the [crime scene] is now imbedded in the car's interior [and its] air filter . . . .

Id. at 106.

Chapter 8, entitled "Danger: Ego, Women, and Partners—Controlling Your Situation" instructs the reader on

how, as a professional killer, to use money, women, and partners. This chapter of the book, for example, instructs the reader on how to use women while committing professional killings without getting caught. Thus, after explaining that the "deceitful, 'game-playing' natures" of women make them potentially better professional killers than men, the book goes on to say that,

> [f]ortunately for the world, a woman usually makes only one man her target, and the nesting instinct quickly takes her off the street and ties her down to the little world of babies, laundry and housework she creates and protects for her own. Unfortunately, even a hit man cannot deny that what women have to offer is a basic necessity.
>
> . . .
>
> [Cautioning against marriage], if [your wife] knows too much, she could someday become [your] worst enemy on the face of the earth and may someday have to be eliminated in the name of self-preservation.
>
> And if she knows too little, her suspicious, jealous nature could lead to more snooping and following and conjecture on her part than is healthy—for either of [you].
>
> . . .
>
> . . . Women are highly emotional, rarely rational creatures. Is ten minutes of pleasure worth your life at the hands (or tongue) of an irate spouse?
>
> . . .
>
> Ideally, a professional hit man will remain single. He will either purchase his sexual pleasures or participate in impersonal one-night-stands. His involvement with women will only be on a sexual level. He will not live with them, nor will he let them invade his privacy . . . . In most cases, they won't even know his real name.
>
> . . .

> As a man, I appreciate as much as anyone a good-looking body and a warm, willing smile on a woman. As a professional, however, that seems to have lost some of its thrill as I've moved on to bigger, more exciting and more dangerous prey.

Id. at 114-17. The chapter also advises the reader on how to enjoy the fruits of crime without getting caught, warning that,

> Unless you have additional sources of income to justify large expenditures like a new home, paying off an old mortgage or a new sports car, *don't* spend any of your earnings on big items of this type. Big expenditures arouse suspicion, not only of your friends and family, but of the IRS and the authorities if you should ever come under investigation.
> *Id.* at 113.

Id. at 113.

The final chapter of *Hit Man*, entitled "Legally Illegal," includes various sections instructing the reader on how and where to purchase false identification, how to make false identification, how to launder illegal money, and how to act in encounters with law enforcement officers. For example, the book instructs how to "launder" "illegal money" through the use of a tax haven in the Cayman Islands:

> The procedure is really quite simple: You form a corporation in [an offshore Island country] and put your illegal monies into that corporation. Then you form a *legal* U.S. corporation as your business and *borrow* the money you need to get going from the foreign corporation you have previously set up. . . .
>
> Let's say your legal American corporation is a land development company, because you want to invest your laundered monies into real estate. . . .
> [Instructions continue].

Id. at 124. The book concludes by offering advice on how to escape punishment by exploiting legal technicalities in the event that the reader is arrested by the police, including how to avoid jailhouse snitches and undercover agents.

As *Hit Man* instructs, it also steels its readers to the particular violence it explicates, instilling in them the resolve necessary to carry out the crimes it details, explains, and glorifies. Language such as that which is reprinted in the prologue to this opinion, and similar language uncanny in its directness and power, pervades the entire work:

> You may threaten, bargain, torture or mutilate to get the information you want, and *you must be prepared to use whatever method works.*
>
> . . .
>
> You are working. This is your job and you are a professional.
>
> . . .
>
> . . . You have the power and ability to stand alone. *You no longer need a reason to kill.*
>
> . . .
>
> . . . You are a hardened criminal. You are capable of performing cold-blooded murder for a fee . . . . [Y]ou are not fit to be a part of organized society.

Id. at 66, 100, 111, 127 (second emphasis added). Speaking directly to the reader in the second person, like a parent to a child, *Hit Man* addresses itself to every potential obstacle to murder, removing each, seriatim, until nothing appears to the reader to stand between him and his execution of the ultimate criminal act. To those who are reluctant because of the value of human life, *Hit Man* admonishes that "[l]ife is *not* robust and precious and valuable" and that "[e]verything you have been taught about life and its value was a fallacy[,] [a] dirty

rotten lie." *Id.* at 107. To those who fear guilt or remorse, the book reassures:

> You made it! Your first job was a piece of cake! Taking all that money for the job was almost like robbery. Yet here you are, finally a *real* hit man with *real* hard cash in your pockets and that first notch on your pistol.
>
> . . .
>
> [After killing your first victim] [Y]ou felt *absolutely nothing*. And you are shocked by that nothingness. You had expected this moment to be a specular point in your life. You had wondered if you would feel compassion for the victim, immediate guilt, or even experience direct intervention by the hand of God. But you weren't even feeling sickened by the sight of the body.

Id. at 106-07. And the book allays the natural apprehension about the immediate aftermath of the murders it counsels:

> After you have arrived home [after your kill], the events that took place take on a dreamlike quality. You don't dwell on them. You don't worry. You don't have nightmares. You don't fear ghosts. When thoughts of the hit go through your mind, it's almost as though you are recalling some show you saw on television.
>
> By the time you collect the balance of your contract fee, the doubts and fears of discovery have faded. Those feelings have been replaced by cockiness, a feeling of superiority, a new independence and self-assurance.

Id. at 108. Those who fear their cold-bloodedness are assuaged with the reminders that "a hit man has a wide range of feelings" and that he "may be extremely compassionate towards the elderly or disabled" or "even . . . religious in his own way." *Id.* at 106. And for those who fear only that they will be caught, comes the ominous

pledge that "the American Justice System is so bogged down in technicalities, over-crowded jails, plea bargaining and a host of other problems that even if charged with a serious crime, we [as killers] can rest assured that the law is on our side," *see id.* at 125, that a "true" "professional" 'won't ever have to face [various] legal predicaments." *Id.* at 130.

Indeed, one finds in *Hit Man* little, if anything, even remotely characterizable as the abstract criticism that *Brandenburg* jealously protects. *Hit Man*'s detailed, concrete instructions and adjurations to murder stand in stark contrast to the vague, rhetorical threats of politically or socially motivated violence that have historically been considered part and parcel of the impassioned criticism of laws, policies, and government indispensable in a free society and rightly protected under *Brandenburg*. The speech of *Hit Man* defies even comparison with the Klansman's chilling, but protected, statement in *Brandenburg* itself that, "[the Ku Klux Klan is] not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken," 395 U.S. at 446; the protestor's inciteful, but protected, chant in *United States* v. *Hess*, 414 U.S. 105, 108 (1973) that "[w]e'll take the fucking street again"; the NAACP speaker's threat, rhetorical in its context, to boycott violators that "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck," which was held to be protected in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982); or the draft protestor's crude, but protected, blustering in *Watts* that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J," *Watts* v. *United States*, 394 U.S. 705, 706 (1969).

Plaintiffs observed in their submissions before the district court that,

> *Hit Man* is not political manifesto, not revolutionary diatribe, not propaganda, advocacy, or protest, not

> an outpouring of conscience or credo.
>
> . . .
>
> It contains no discussion of *ideas*, no argument, no information about politics, religion, science, art, or culture . . . it offers no agenda for self-governance, no insight into the issues of the day . . . .

Appellant's Br. at 32; Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment at 31-32. And, this is apt observation. *Hit Man* is none of this. Ideas simply are neither the focus nor the burden of the book. To the extent that there are any passages within *Hit Man*'s pages that arguably are in the nature of ideas or abstract advocacy, those sentences are so very few in number and isolated as to be legally of no significance whatsoever.[9] *Cf. Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication."); *see also Miller*, 413 U.S. at 24; *Penhouse International, Ltd.* v. *McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), *cert. dismissed*, 447 U.S. 931 (1980). *Hit Man* is, pure and simple, a step-by-step murder manual, a training book for assassins. There is nothing even arguably

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[9] This circuit and others have repeatedly rejected Paladin's argument that speech can be punished under the speech act doctrine, without regard to the strictures of *Brandenburg*, only when that speech has *no* purpose or value other than to facilitate a specific wrongful act. *See* Appellee's Supp. Br. at 9. Thus, in *Kelley*, we found the defendant's concrete promotion of, and provision of instructions for, tax evasion unprotected by the First Amendment, even though the defendant offered his advice in a meeting of a group indisputably dedicated to the political belief that the federal income tax is unconstitutional as applied to wages. 769 F.2d at 216-17. And in *Freeman*, the Ninth Circuit upheld a similar conviction, even though the defendant's speech "spr[ang] from the anterior motive to effect political or social change." 761 F.2d at 551. *See also Agee*, 453 U.S. at 308-09 (holding that a former Central Intelligence Agency employee's disclosure of intelligence information was unprotected by the First Amendment even though the employee was "also engaged in criticism of the Government").

tentative or recondite in the book's promotion of, and instruction in, murder.[10] To the contrary, the book directly and unmistakably urges concrete violations of the laws against murder and murder for hire and coldly instructs on the commission of these crimes. The Supreme Court has never protected as abstract advocacy speech so explicit in its palpable entreaties to violent crime.

2.

In concluding that *Hit Man* is protected "advocacy," the district court appears to have misperceived the nature of the speech that the Supreme Court held in *Brandenburg* is protected under the First Amendment. In particular, the district court seems to have misunderstood the Court in *Brandenburg* as having distinguished between "advocating or teaching" lawlessness on the one hand, and "inciting or encouraging" lawlessness on the other, any and all of the former being entitled to First Amendment protection. The district court thus framed the issue before it as "whether *Hit Man* merely advocates or teaches murder or whether it incites or encourages murder." J.A. at 212. And, finding that *Hit Man* "merely teaches" in technical fashion the fundamentals of murder, it concluded that "[t]he book does not cross that line between permissible advocacy and impermissible incitation to crime or violence." *Id.* at 218.

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[10] The several brief "disclaimers" and "warnings" in *Hit Man*'s advertisement description and on its cover, that the book's instructions are "for informational purposes only!" and "for academic study only!," and that "[n]either the author nor the publisher assumes responsibility *for the use* or misuse *of the information contained in this book*," are plainly insufficient in themselves to alter the objective understanding of the hundreds of thousands of words that follow, which, in purely factual and technical terms, tutor the book's readers in the methods and techniques of killing. These "disclaimers" and "warnings" obviously were affixed in order to titillate, rather than "to dissuade readers from engaging in the activity [the book] describes," as the district court suggested they might be understood, J.A. at 219.

The Court in *Brandenburg*, however, did not hold that "mere teaching" is protected; the Court never even used this phrase. And it certainly did not hold, as the district court apparently believed, that *all* teaching is protected. Rather, however inartfully it may have done so, the Court fairly clearly held only that the "mere *abstract* teaching" of principles, *id.* at 447-48 (*quoting Noto*, 367 U.S. at 297-98) (emphasis added), and "mere *advocacy*," 395 U.S. at 448-49 (emphasis added), are protected. In the final analysis, it appears the district court simply failed to fully appreciate the import of the qualification to the kind of "teaching" that the Supreme Court held to be protected in *Brandenburg*. *See* J.A. at 217 (defining "advocacy" as "mere teaching" rather than "mere abstract teaching" but citing to *Brandenburg*, 395 U.S. at 448 (quoting *Noto*, 367 U.S. at 297-98)). As the Supreme Court's approving quotation from its opinion in *Noto* confirms, it is not teaching simpliciter, but only "the mere *abstract* teaching . . . *of the moral propriety or even moral necessity*" for resort to lawlessness, or its equivalent, that is protected under the commands of *Brandenburg*, 367 U.S. at 297-98 (emphasis added).[11]

Although we believe the district court's specific misreading of *Brandenburg* was plainly in error, we cannot fault the district court for its confusion over the opinion in that case. The short *per curiam* opinion in *Brandenburg* is, by any measure, elliptical.

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[11] Even if the district court were correct in its holding that *Hit Man* is speech somehow deserving of the protections of *Brandenburg*, we would yet be constrained to reverse the court's judgment. Given Paladin's remarkable stipulations that it knew that its murder manual would be used by murderers, would-be murderers, and other criminals *"upon receipt"* to assist them in the planning, commission, and cover up of their crimes, that the publisher intended that the manual would be so used, and that *Hit Man* actually assisted Perry's commission of the crime of murder, we could not conclude *as a matter of law* that *Hit Man* is not directed to inciting and likely to incite imminent lawlessness.

In particular, the Court unmistakably draws the distinction discussed above, between "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence" on one hand, 395 U.S. at 448, and the "prepar[ation] [of] a group for violent action and steeling it to such action" on the other. *Id.* And it then recites in the very next sentence that "[a] statute which fails to draw *this* distinction," *id.* (emphasis added)—a seeming reference to the distinction between "mere abstract teaching" and "preparing and steeling"—is unconstitutional under the First Amendment. In the suceeding paragraph and a later footnote, however, the Court distinguishes between "mere advocacy" and "incitement to imminent lawless action," a distinction which, as a matter of common sense and common parlance, appears different from the first distinction drawn, because "preparation and steeling" can occur without "incitement," and vice-versa. *See id.* at 448 ("Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action." (footnote omitted)); *id.* at 449 n.4 ("Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action . . . .").

It would have been natural, based upon its prior cases, for the Court actually to have contemplated and intended both distinctions, and to have developed the latter only, because the case before it turned exclusively on that distinction. It is more likely, however, that the Court did not focus at all on the seeming facial incongruity between the first and the latter two of these distinctions. The Court, therefore, may well have intended to equate the preparation and steeling of a group to violent action with speech that is directed to inciting imminent lawless action and likely to produce such action. In other words, the Court may well have meant to imply that one pre-

pares and steels another or others for violent action only when he does so through speech that is "directed to inciting or producing imminent lawless action and . . . [that is] likely to incite or produce such action," *id.* at 447, and thus that preparation and steeling is not *per se* unprotected. *Compare id.* at 447-48 ("As we said in *Noto* . . . .") *with Noto*, 367 U.S. at 298 (describing preparation and steeling through "a call to violence"). Assuming that it did so mean to imply, however, we are confident it meant to do so only in the context of *advocacy*—speech that is part and parcel of political and social discourse—which was the only type of speech at issue in *Brandenburg*, *Noto*, and the other cases relied upon by the Court. *See, e.g., 44 Liquormart* v. *Rhode Island*, 116 S. Ct. 1495, 1505 (1996) (Stevens, J., for plurality) (describing *Brandenburg* as setting forth "test for suppressing political speech"). The Court even so defined its own holding: "These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe *advocacy* of the use of force or of law violation except where such *advocacy* is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447 (footnote omitted; emphases added). For, as this case reveals, and as the Court itself has always seemed to recognize, one obviously can prepare, and even steel, another to violent action not only through the dissident "call to violence," but also through speech, such as instruction in the methods of terror or other crime, that does not even remotely resemble advocacy, in either form or purpose. And, of course, to understand the Court as addressing itself to speech other than advocacy would be to ascribe to it an intent to revolutionize the criminal law, in a several paragraph *per curiam* opinion, by subjecting prosecutions to the demands of *Brandenburg*'s "imminence" and "likelihood" requirements whenever the predicate conduct takes, in whole or in part, the form of speech—an intent that no

lower court has discerned and that, this late in the day, we would hesitate to impute to the Supreme Court.

Accordingly, we hold that plaintiffs have stated, sufficient to withstand summary judgment, a civil cause of action against Paladin Enterprises for aiding and abetting the murders of Mildred and Trevor Horn and Janice Saunders on the night of March 3, 1993, and that this cause of action is not barred by the First Amendment to the United States Constitution.

IV.

Paladin, joined by a spate of media *amici*, including many of the major networks, newspapers, and publishers, contends that *any* decision recognizing even a potential cause of action against Paladin will have far-reaching chilling effects on the rights of free speech and press. *See* Br. of *Amici* at 3, 22 ("Allowing this lawsuit to survive will disturb decades of First Amendment jurisprudence and jeopardize free speech from the periphery to the core. . . . No expression—music, video, books, even newspaper articles—would be safe from civil liability."). That the national media organizations would feel obliged to vigorously defend Paladin's assertion of a constitutional right to *intentionally and knowingly* assist murderers with technical information which Paladin *admits* it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking. But be that as it may, it should be apparent from the foregoing that the indisputably important First Amendment values that Paladin and *amici* argue would be imperiled by a decision recognizing potential liability under the peculiar facts of this case will not even arguably be adversely affected by allowing plaintiffs' action against Paladin to proceed. In fact, neither the extensive briefing by the parties and the numerous *amici* in this case, nor the exhaustive research which the court itself has undertaken, has revealed even a single case that we regard as factually analogous to this case.

Paladin and *amici* insist that recognizing the existence of a cause of action against Paladin predicated on aiding and abetting will subject broadcasters and publishers to liability whenever someone imitates or "copies" conduct that is either described or depicted in their broadcasts, publications, or movies. This is simply not true. In the "copycat" context, it will presumably *never* be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been *mis*used vis-a-vis the use intended, not, as here, used precisely as intended. It would be difficult to overstate the significance of this difference insofar as the potential liability to which the media might be exposed by our decision herein is concerned.

And, perhaps most importantly, there will almost never be evidence proffered from which a jury even *could* reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity. In only the rarest case, as here where the publisher has stipulated in almost taunting defiance that it intended to assist murderers and other criminals, will there be evidence extraneous to the speech itself which would support a finding of the requisite intent; surely few will, as Paladin has, "stand up and proclaim to the world that because they are publishers they have a unique constitutional right to aid and abet murder." Appellant's Reply Br. at 20. Moreover, in contrast to the case before us, in virtually every "copycat" case, there will be lacking in the speech itself any basis for a permissible inference that the "speaker" intended to assist and facilitate the criminal conduct described or depicted. Of course, with few, if any, exceptions, the speech which gives rise to the copycat crime will not directly and affirmatively promote the criminal conduct, even if, in some circumstances, it incidentally glamorizes and thereby indirectly promotes such conduct.

Additionally, not only will a political, informational, educational, entertainment, or other wholly legitimate purpose for the description or depiction be demonstrably apparent; but the description or depiction of the criminality will be of such a character that an inference of impermissible intent on the part of the producer or publisher would be unwarranted as a matter of law. So, for example, for almost any broadcast, book, movie, or song that one can imagine, an inference of unlawful motive from the description or depiction of particular criminal conduct therein would almost never be reasonable, for not only will there be (and demonstrably so) a legitimate and lawful purpose for these communications, but the contexts in which the descriptions or depictions appear will themselves negate a purpose on the part of the producer or publisher to assist others in their undertaking of the described or depicted conduct. *Compare Miller*, 413 U.S. 15.

Paladin contends that exposing it to liability under the circumstances presented here will necessarily expose broadcasters and publishers of the news, in particular, to liability when persons mimic activity either reported on or captured on film footage and disseminated in the form of broadcast news. Appellee's Br. at 26 n.17. This contention, as well, is categorically wrong. News reporting, we can assume, no matter how explicit it is in its description or depiction of criminal activity, could never serve as a basis for aiding and abetting liability consistent with the First Amendment. It will be self-evident in the context of news reporting, if nowhere else, that neither the intent of the reporter nor the purpose of the report is to facilitate repetition of the crime or other conduct reported upon, but, rather, merely to report on the particular event, and thereby to inform the public.

A decision that Paladin may be liable under the circumstances of this case is not even tantamount to a holding that all publishers of instructional manuals may be liable for the misconduct that ensues when one follows the

instructions which appear in those manuals. Admittedly, a holding that Paladin is not entitled to an absolute defense to the plaintiffs' claims here may not bode well for those publishers, if any, of factually detailed instructional books, similar to *Hit Man*, which are devoted exclusively to teaching the techniques of violent activities that are criminal *per se*. But, in holding that a defense to liability may not inure to publishers for their dissemination of such manuals of criminal conduct, we do not address ourselves to the potential liability of a publisher for the criminal use of published instructions on activity that is either entirely lawful, or lawful or not depending upon the circumstances of its occurrence. Assuming, as we do, that liability could not be imposed in these circumstances on a finding of mere foreseeability or knowledge that the instructions might be misused for a criminal purpose, the chances that claims arising from the publication of instructional manuals like these can withstand motions for summary judgment directed to the issue of intent seem to us remote indeed, at least absent some substantial confirmation of specific intent like that that exists in this case.

Thus, while the "horribles" paraded before us by Paladin and *amici* have quite properly prompted us to examine and reexamine the established authorities on which plaintiffs' case firmly rests, we regard them ultimately as but anticipatory of cases wholly unlike the one we must decide today.

Paladin Press in this case has *stipulated* that it specifically targeted the market of murderers, would-be murderers, and other criminals for sale of its murder manual. Paladin has *stipulated both* that it had knowledge *and* that it intended that *Hit Man* would immediately be used by criminals and would-be criminals in the solicitation, planning, and commission of murder and murder for hire. And Paladin has *stipulated* that, through publishing and selling *Hit Man*, it "assisted" Perry in particular in the perpetration of the brutal triple murders for which plaintiffs now seek to hold the publisher liable. Beyond these

startling stipulations, it is alleged, and the record would support, that Paladin assisted Perry through the quintessential speech act of providing Perry with detailed factual instructions on how to prepare for, commit, and cover up his murders, instructions which themselves embody not so much as a hint of the theoretical advocacy of principles divorced from action that is the hallmark of protected speech. And it is alleged, and a jury could find, that Paladin's assistance assumed the form of speech with little, if any, purpose beyond the unlawful one of facilitating murder.

Paladin's astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man*'s instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law. In at least these circumstances, we are confident that the First Amendment does not erect the absolute bar to the imposition of civil liability for which Paladin Press and *amici* contend. Indeed, to hold that the First Amendment forbids liability in such circumstances as a matter of law would fly in the face of all precedent of which we are aware, not only from the courts of appeals but from the Supreme Court of the United States itself. *Hit Man* is, we are convinced, the speech that even Justice Douglas, with his unrivaled devotion to the First Amendment, counseled without any equivocation "should be beyond the pale" under a Constitution that reserves to the people the ultimate and necessary authority to adjudge some conduct—and even some speech—fundamentally incompatible with the liberties they have secured unto themselves.

The judgment of the district court is hereby reversed, and the case remanded for trial.

It is so ordered

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Case No: AW-95-3811

VIVIAN RICE, Guardian and Next Friend
of TAMIELLE HORN, A minor, *et al.*,
Plaintiffs,

v.

PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

Case No. AW-96-444

MICHAEL D. SAUNDERS, *et al.*,
Plaintiffs,

vs.

PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

SECOND AMENDED ORDER

UPON CONSIDERATION OF the Motion for Summary Judgment filed by Defendant Paladin Enterprises, Inc. and the Plaintiffs' Opposition thereto, and, further, upon consideration of Plaintiff's Motion to Amend Judgment, or Alternatively, for Relief from Judgment, and Defendant's Opposition thereto, and for the reasons set forth in this Court's Amended Memorandum Opinion dated September 6, 1996, it is this 11th day of September, 1996,

ORDERED, that Defendant's Motion for Summary Judgment be, and hereby is, GRANTED; and it is further

ORDERED, that Plaintiffs' Motion to Amend Judgment, or Alternatively, for Relief from Judgment be, and hereby is, DENIED, and it is further

ORDERED, that pursuant to F.R.P. Rule 54(b), upon the Court's express determination that there is no just reason for delay, final judgment be, and hereby is entered on behalf of Defendant Paladin Enterprises, Inc. and against the Plaintiffs herein and it is further

ORDERED, that the Clerk of the Court enter final judgment on behalf of the defendant Paladin Enterprises, Inc. and that said case be CLOSED.

/s/ Alexander Williams, Jr.
ALEXANDER WILLIAMS, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. AW 95-3811
(consolidated)

VIVIAN RICE, *et al.*,
Plaintiffs,

v.

PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

Civil Action No. AW 96-444
(consolidated)

MICHAEL D. SAUNDERS, *et al.*,
Plaintiffs,

v.

PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

AMENDED MEMORANDUM OPINION

Plaintiffs filed wrongful death and survival actions against the Defendants Paladin Enterprises, Inc. ("Paladin"), a book publishing company, and its President, Peter Lund, for the triple murder committed by convicted killer, James Perry, who had purchased two of the Defendants' books prior to committing the murders.[1] Fed-

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[1] James Perry was convicted in Montgomery County Circuit Court and sentenced to death for killing Mildred Horn, her 8 year old

eral jurisdiction is properly invoked pursuant to 28 U.S.C. § 1332(a)(1) because the parties are from different states and the amount in controversy exceeds $50,000. According to the Plaintiffs, the Defendants aided and abetted the murders of the three decedents by publishing two books which James Perry consulted to commit the murders: *Hit Man: A Technical Manual for Independent Contractors* ("*Hit Man*") and *How to Make a Disposable Silencer, Vol. II* ("*Silencers*"). The Plaintiffs are also seeking damages in their survival and wrongful death actions based on theories of civil conspiracy, strict liability, and negligence.

Pending before the Court is the Defendants' motion for summary judgment. The Defendants argue, at the outset, that they cannot be held liable for civil damages because they have a First Amendment right to publish these books. The Court has considered the parties respective memoranda and the entire record. The Court has also permitted oral argument by counsel at a hearing conducted on July 22, 1996. For the reasons that follow, the Court will grant the Defendants' motion for summary judgment.

I. *Background*

For the purposes of this motion, the parties have stipulated to the following set of facts. *Hit Man* and *Silencers* were both published in 1983 and, since then, approximately 13,000 copies of each book have been sold nationally. Paladin advertises the book in its mail order catalogue which has the following description:

> HIT MAN
>
> A Technical Manual for Independent Contractors
> *by Rex Feral*

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quadriplegic son, Trevor, and the boy's nurse, Janice Saunders. Lawrence Horn was also convicted in Montgomery County Circuit Court and sentenced to life without the possibility of parole for hiring Perry to commit the murders.

> Rex Feral kills for hire. Some consider him a criminal. Others think him a hero. In truth, he is a lethal weapon aimed at those he hunts. He is a last recourse in these times when laws are so twisted that justice goes unserved. He is a man who feels no twinge of guilt at doing his job. *He is a professional killer.*
>
> Learn how a pro gets assignments, creates a false identity, makes a disposable silencer, leaves the scene without a trace, watches his mark unobserved and more. Feral reveals how to get in, do the job and get out without getting caught. *For academic study only.* 5½ x 8½, softcover, 19 photos, illus., 144 pp.
> ISBN 0-87364-276-7 $10.00

Def.'s Ex. 1 at 41.

On the page preceding the table of contents, the following disclaimer appears:

WARNING

> IT IS AGAINST THE LAW TO manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. For informational purposes only!

Def.'s Ex. B at v.

It is undisputed that prior to March 3, 1992, Lawrence Horn began plotting with James Perry of Detroit, Michigan to have Perry murder his ex-wife, Mildred Horn, and his son, Trevor. On or about January 24, 1992, James Perry responded to a catalogue solicitation by the defendant, Paladin, advertising *Hit Man* and *Silencers.* Perry

ordered and received both publications. Paladin had no other contact with Perry nor with Lawrence Horn.

On March 3, 1993, James Perry traveled from Detroit, Michigan to Montgomery County, Maryland and murdered Mildred Horn, Trevor Horn, and Janice Saunders, Trevor's private duty nurse. Perry followed a number of instructions outlined in *Hit Man* and *Silencers* in planning, executing and attempting to get away with the murders. However, Defendants had no specific knowledge that either Perry or Horn planned to commit a crime; that Perry and Horn had entered into a conspiracy for the purpose of committing a crime; nor that Perry had been retained by Horn to murder Mildred Horn, Trevor Horn, or Janice Saunders.

Defendants concede, for the purposes of this motion, that in publishing, distributing and selling *Hit Man* and *Silencers* to Perry, they assisted him in the subsequent perpetration of the murders which are the subject of this litigation. For example, each of the excerpts from *Hit Man* listed below was followed by Perry in the planning and execution of the murders for which he was convicted:

> "What other basic equipment will the beginner need as essential tools of his trade? . . . [an] AR-7 rifle." (p. 21)

James Perry used an AR-7 rifle to commit the murders of Mildred Horn and Janice Saunders.

> "The AR-7 rifle is recommended because it is both inexpensive and accurate. The barrel breaks down for storage inside the stock with the clip. It is lightweight and easy to carry or conceal when disassembled." (p. 22)

After the murders, James Perry disassembled the AR-7 rifle as instructed by the Defendants.

> "The AR-7 has a serial number stamped on the case, just above the clip port. This number should be completely drilled out. The hole left will be unsightly but will not interfere with the working mechanism of the gun or the clip feed." (p. 23)

James Perry drilled out the serial number of the AR-7 rifle exactly as instructed by the Defendants.

> "The directions and photographs that follow show in explicit detail how to construct a silencer for a Ruger 10/22 rifle. The same directions can be followed successfully to construct a silencer for any weapon, with only the size of the drill rod used for alignment changed to fit the inside dimension of the barrel." (p. 39)

James Perry used a home made silencer which he used to silently kill Mildred Horn and Janice Saunders.

> "Close kills are by far preferred to shots fired over a long distance. You will need to know beyond any doubt that the desired result has been achieved. When using a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. You will not want to be a point blank range to avoid having the victim's blood splatter you or your clothing. At least three shots should be fired to insure quick and sure death . . . aim for the head—preferably the eye sockets if you are a sharpshooter." (p. 24)

James Perry shot Mildred Horn and Janice Saunders from a distance of three feet. He shot them each three times in the eyes.

> "Use a rat-tail file, alter the gun barrel, the shell chamber, the loading ramp, the firing pin and the ejector pin. Each one of these items leaves its own definite mark and impression on the shell casing, which if any shells happened to be left behind, can

> be matched up to the gun under a microscope in a police laboratory. (p. 25) . . . Of primary importance now too, is changing the rifling of the murder weapon. This should be done even before you leave the crime scene. That way, even if you get picked up or stopped with the weapon in your possession, its ballistics will not match the bullets you left behind in the mark." (p. 105)

James Perry filed down the parts of the AR-7 Rifle.

Perry followed additional instructional references from *Hit Man* in planning and executing the murders, including how to solicit for and obtain prospective clients in need of murder for hire services; requesting up-front money for expenses; how to register at a motel in the vicinity of the crime, paying with cash and using a fake license tag number; committing the murders at the victims' home; how to make the crime scene look like a burglary; reminding to clean up and carry away the ejected shells; breaking down the gun and discarding the pieces along the roadside after the murders; and using a rental car, a stolen tag on the rental car and the discarding of the tag after the murders.

Paladin engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes. In publishing, marketing, advertising and distributing *Hit Man* and *Silencers, Paladin* intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications.

All parties agree that Paladin's marketing strategy is intended to maximize sales to the public, including authors who desire information for the purpose of writing books about crime and criminals, law enforcement officers and

agencies who desire information concerning the means and methods of committing crimes, persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment, persons who fantasize about committing crimes but do not thereafter commit them, and criminologists and others who study criminal methods and mentality.

II. *Legal Standard*

A. *Summary Judgment Principles*

Summary judgment will be granted when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). While the Court views the underlying facts and all reasonable inferences drawn therefrom in the light most favorable to the opposing party, *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), the mere existence of a "scintilla of evidence" is not enough to frustrate the motion. To defeat a motion for summary judgment, a party must present evidence of specific facts from which the finder of fact could reasonably find for him. *Anderson*, 477 U.S. at 252; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. *First Amendment Freedom of Speech*

The First Amendment to the United States Constitution states that Congress shall make no law abridging the freedom of speech, or of the press. The First Amendment applies to the states through the Fourteenth Amendment. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 n.2 (1980) (Stewart, J., concurring). The imposition of tort liability constitutes state action, so the First Amendment is applicable in this case. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Simply stated, if the Court finds that *Hit Man* is protected by the First Amendment, the Plaintiffs are barred from maintaining tort claims against Paladin. Admittedly, the Court's task is both novel and awesome; the Court must balance society's interest in compensating injured parties against the freedom of speech guaranteed by the First Amendment. The First Amendment bars the imposition of civil liability on Paladin unless *Hit Man* falls within one of the well-defined and narrowly limited classes of speech that are unprotected by the First Amendment. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72 (1942).

Those classes of speech which receive limited or no First Amendment protection include: (1) obscenity, *Miller v. California,* 413 U.S. 15, 24 (1973); (2) fighting words, *Chaplinsky,* 315 U.S. at 572; (3) libel, *New York Times Co. v. Sullivan,* 376 U.S. 254, 267 (1964); (4) commercial speech, *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 456 (1978) and; (5) words likely to incite imminent lawless action, *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

Hit Man cannot be characterized as obscenity because it does not "depict[t] or describ[e], in a patently offensive way, sexual conduct . . ." *Miller,* 413 U.S. at 24. Nor can it be categorized as fighting words since the words in the book do not, "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky,* 315 U.S. at 572. *Hit Man* clearly is not libelous since it does not tend to injure the reputation of any particular individual. *New York Times,* 376 U.S. at 267.

Hit Man does not fall into the category of commercial speech. It is well settled that commercial speech is speech which does "no more than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, et al.,* 413 U.S. 376, 385 (1973). Commercial speech also provides information for pur-

poses of inviting or enticing one to buy goods or services. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (noting the informational function of commercial speech). Although *Hit Man* is published for profit, the book itself cannot be considered an effort to achieve the type of commercial result that an advertisement is designed to achieve. Therefore, the book cannot be characterized as commercial speech.

The Court believes that the only category of unprotected speech under which *Hit Man* could conceivably be placed is incitement to imminent, lawless activity under *Brandenburg*. Therefore, as will be discussed shortly, the Court will conduct its analysis of whether the book is protected by the First Amendment under the *Brandenburg* standard.

III. *Discussion*

Plaintiffs have essentially advanced five arguments to support its assertion that summary judgment should not be granted in this case. First, Plaintiffs argue that the First Amendment does not protect speech aiding and abetting murder. Paper No. 22 at 2. Plaintiffs' second argument is that the "knowing or reckless disregard for human life" standard of *New York Times* is the appropriate standard to be applied to this case. Paper No. 22 at 26. Third, Plaintiffs contend that the *Brandenburg* standard does not apply. Paper No. 22 at 23. Fourth, they argue that even if the Court finds that *Brandenburg* applies, that standard does not bar liability in this action. Paper No. 22 at 7. Finally, Plaintiffs urge the Court to be guided by the decisions in the *Soldier of Fortune* cases. The Court will address each of these arguments in turn.

A. *Aiding and Abetting*

A brief history of aiding and abetting will serve to guide the Court in its analysis. Aiding and abetting is an

ancient criminal law doctrine. *Central Bank v. First Interstate Bank,* 114 S.Ct. 1439, 1450 (1994) (citing *United States v. Peoni,* 100 F.2d 401, 402 (CA2 1938); 1 M. Hale, Pleas of the Crown 615 (1736)). Though there is no federal common law of crimes, Congress in 1909 enacted what is now 18 U.S.C. § 2, a general aiding and abetting statute applicable to all federal criminal offenses. *Central Bank,* 114 S.Ct. at 1450. The statute decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime. *Id.* (citing *Nye & Nissen v. United States,* 336 U.S. 613, 619 (1949).

The Restatement of Torts, under a concert of action principle, accepts a doctrine similar to criminal aiding and abetting. *Central Bank,* 114 S.Ct. at 1450. An actor is liable for harm resulting to a third person from the tortious conduct of another "if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other . . ." *Central Bank,* 114 S.Ct. at 1450 (citing Restatement (Second) of Torts § 876(b) (1977)). However, the doctrine has been at best uncertain and limited in application. The concept of tortious aiding and abetting has turned up frequently in the evaluation of secondary liability for securities law violations, principally in the area of fraud. *Halberstam v. Welch,* 705 F.2d 472, 485 (D.C. Cir. 1983) (citations omitted).

In some states, it is still unclear whether there is aiding and abetting tort liability of the kind set forth in § 876(b) of the Restatement. *Central Bank,* 114 S.Ct. at 1450 (citing *FDIC v. S. Prawer & Co.,* 829 F. Supp. 453, 457 (D. Maine 1993) (in Maine, "[i]t is clear . . . that aiding and abetting liability did not exist under the common law, but was entirely a creature of statute"); *In re Asbestos School Litigation,* 1991 WL 137128 (E.D.Pa. 1991)

(cause of action under Restatement § 876 "has not yet been applied as a basis for liability" by Pennsylvania courts); *Meadow Limited Partnership v. Heritage Savings and Loan Assn*, 639 F. Supp. 643, 653 (E.D.Va. 1986) (aiding and abetting tort based on Restatement § 876 not expressly recognized by the state courts of the Commonwealth of Virginia); *Sloane v. Fauque*, 784 P.2d 895, 896 (1989) (aiding and abetting tort liability is issue "of first impression in Montana").

Plaintiffs argue that *Hit Man* is not protected by the First Amendment because the First Amendment does not protect communication aiding and abetting murder. Paper No. 22 at 2. This argument, the Court believes, fails, however, because of the absence of any reported decision suggesting that Maryland extends the tort of aiding and abetting to the circumstances of this case.[2] A federal court sitting in diversity cannot create new causes of action. *Guy v. Travenol Laboratories, Inc.*, 812 F.2d

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[2] Although Maryland appears to recognize aider and abetter tort liability, (*See Alleco, Inc., et al. v. Weinberg Foundation, Inc., et al.*, 340 Md. 176, 199, 665 A.2d 1038, 1049 (1995)), it has never been applied to support liability in this context. At least one court has imposed civil liability for murder on an aiding and abetting theory. *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). In *Halberstam*, the defendant was the live-in companion of a burglar who committed murder during the course of a burglary. *Id.* at 475. The court held that the defendant was liable for the murder because she knowingly and substantially assisted the burglar in his illicit trade. *Id.* at 487.

Aiding and abetting includes the following elements: (1) the causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation. *Halberstam*, 705 F.2d at 477 (citing *Investors Research Corp. v. SEC*, 628 F.2d 168, 178 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94-95 (5th Cir. 1975); *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139, 162-63 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974)).

911 (4th Cir. 1987); *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14, 15 (1st Cir. 1976); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949). Therefore, the Court cannot apply a new theory or extend the tort of aiding and abetting under Maryland law, nor can the Court create another category of unprotected speech, i.e., speech that aids and abets murder.

Plaintiffs rely on *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982) and *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978) *cert. denied*, 437 U.S. 906 (1978) for the proposition that criminal or tort liability may not be avoided merely because the wrongdoer uses speech to accomplish his illicit purpose. Paper No. 22 at 5. In *Barnett*, the defendant was the publisher of an instruction manual on how to manufacture the illegal drug known as PCP. Another person obtained the defendant's instruction manual and was caught in the act of manufacturing the illegal drugs. *Barnett*, 667 F.2d at 838. The defendant was prosecuted for aiding and abetting the manufacture of PCP. The defendant argued that evidence seized at the crime scene should be suppressed because the defendant had a First Amendment right to print the manual. The Court stated that:

> To the extent, however, that Barnett appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct.

Barnett, 667 F.2d at 843.

Plaintiffs took great pains to outline the parallels between *Barnett* and the instant case: 1) defendants in both cases published and advertised step-by-step instructions on how to commit crimes; 2) defendants in both cases mailed an instruction manual to an unknown person who re-

sponded to the advetrisement; and 3) perpetrators in both cases followed the step-by-step instructions to commit the crimes. Paper No. 22 at 3. One very important distinction, however, is that *Barnett* is a criminal case where the defendant publisher was charged with criminal aiding and abetting pursuant to 18 U.S.C. § 2. Here, Defendants are not being charged with the crime of aiding and abetting. Rather, Plaintiffs are asking the Court to allow the Defendants to be subjected to civil liability for murder, based on a theory of civil aiding and abetting—a claim that does not exist under Maryland law.

Similarly, in *Buttorff*, the defendants were convicted of aiding and abetting persons who filed false or fraudulent tax returns. *Buttorff*, 572 F.2d at 621. The defendants offered detailed instructions at large public meetings on how to illegally avoid paying taxes. *Id.* at 622. As a result, several individuals engaged in the illegal practices. *Id.* The court rejected the defendants' First Amendment defense and held that:

> Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. . . This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.

Buttorff, 572 F.2d at 624.

While these cases are factually similar, as stated above, Plaintiffs have cited no authority that would allow the Court to apply the holdings in these criminal cases to the facts of the instant case. Furthermore, the court in *Buttorff* applied the *Brandenburg* incitement standard and found that the defendants' speech went beyond mere advocacy to incitement of lawless activity. Therefore, the court held, defendants were not entitled to a First Amend-

ment defense. *Id.* The failure of the First Amendment defense in the *Buttorff* case turned on the court's finding that the subject speech went beyond mere advocacy. Even if *Buttorff* applied in this case, it is not dispositive of a finding that the First Amendment acts as a bar to liability in the instant case.

B. *The New York Times v. Sullivan Standard*

The Plaintiffs posit that the *New York Times v. Sullivan*, 376 U.S. 254 (1964) standard applies to this case. Paper No. 22 at 25. In *New York Times*, the court held that, in order to recover damages in a libel action, a public official must show actual malice or that a statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. *Id.* at 279. Plaintiffs argue that if the First Amendment permits defendants guilty of knowing or reckless misconduct to be held liable in tort for millions of dollars in damages when their publications cause injury to reputation and its attendant emotional harm as in the *New York Times* case, then of course the First Amendment must permit parallel liability in tort when publications cause physical injury and death.

According to Plaintiffs, the appropriate standard to be applied in the case at bar is "knowing or reckless disregard for human life." Paper No. 22 at 26. However, the Plaintiffs cite no authority for this novel proposition. Furthermore, the Court finds that *New York Times v. Sullivan* is inapposite because, unlike the instant case, that case involved speech that tends to injure the reputation of a particular individual. The holding in that case has no bearing on the facts of this case.

Plaintiffs rely heavily on *Weirum v. RKO General, Inc.*, 15 Cal.3d 40 (1975) for the proposition that defendants can be held liable for physical injury caused by their words. In *Weirum*, the court affirmed an award of damages to the plaintiff in a wrongful death action against a

radio station. The decedent was negligently forced off a highway by a listener to defendant's radio station which was conducting a contest rewarding the first contestant to locate a disc jockey travelling throughout the listening area. The court rejected the station's First Amendment defense, stating that

> "[d]efendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. . . The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." *Id.* at 48.

Weirum can be distinguished from the instant case because the Weirum broadcasts actively and repeatedly encouraged listeners to speed to announced locations. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner. No such urging occurred in this case.

The Plaintiffs go on to cite several cases where the Supreme Court has approved civil liability sounding in tort, contract, and statutory causes of action despite the defendants' attempt to assert a First Amendment defense.[3]

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[3] *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-79 (1977) (holding that First Amendment did not protect defendants from liability under the common-law tort of "appropriation" or "right of publicity" when news media filmed plaintiff's "human cannonball" act at a county fair and broadcast the act without the plaintiff's permission, and reasoning that it was enough that defendants knew that the plaintiff objected to the broadcast and went forward anyway); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667-72 (holding that the First Amendment does not bar application of ordinary principles of state contract and promissory estoppel law in suit against newspaper for breaching promise of confidentiality and printing a source's name); *Goldstein v. California*, 412 U.S. 546, 571 (1973) (upholding California's "record piracy" law, noting that "[n]o restraint has been placed on the use of an idea or concept"); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 568 (1985) (upholding copyright infringement action against *The Nation* magazine for printing excerpts from

The Court agrees with Plaintiffs that a defendant does not enjoy absolute immunity from criminal or tort liability merely because he uses speech. The critical issue, however, is whether that speech is protected by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).

C. *The Brandenburg Standard*

The Court must analyze the character of the words used in *Hit Man*, using the appropriate standard, and then decide whether that type of speech is protected by the First Amendment. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984). The Court finds that, of the five classes of speech which states may proscribe within First Amendment guidelines, the only one under which Plaintiffs could conceivably maintain this action is incitement to imminent, lawless activity under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See, e.g., Hess v. Indiana*, 414 U.S. 105 (1973); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036, 1040 (R.I. 1982).

In *Brandenburg*, a Ku Klux Klan leader was convicted under the Ohio criminal syndicalism statute for assembling with others at a rally and saying, among other things:

> "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white Caucasian race, it's possible there might have to be some revengeance taken."

Id. at 446.

The statute at issue in that case prohibited:

> "[A]dvocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of

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President Gerald Ford's memoirs, holding that the First Amendment did not shield the magazine from the normal principles of copyright liability); *Snepp v. United States*, 444 U.S. 507, 511-16 (1980) (upholding constructive trust on defendants' book royalties for book published in violation of pre-clearance agreement with CIA).

> terrorism as a means of accomplishing industrial or political reform . . . and voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

The Supreme Court reversed the conviction holding that:

> The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

395 U.S. at 447.

The Supreme Court distinguished between speech which merely advocates law violation and speech which incites imminent lawless activity; the former is protected, but the latter is not. *Id.* at 448. The court reasoned that a statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. *Id.* The court found that the words spoken by the Klansman amounted to mere advocacy, and the statute which punished such speech was unconstitutional. *Id.* at 449.

The Court must decide, therefore, whether *Hit Man* merely advocates or teaches murder or whether it incites or encourages murder. *Id.* The Court must examine not only the content of the speech in this case, but also the context in which it was disseminated. *See, e.g., American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) ("[T]he line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 n. 50 (1982) (". . . [T]he question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech

which may legitimately be regulated' . . . In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect) (citations omitted).

Plaintiffs argue that the *Brandenburg* standard is not a First Amendment "universal," applied in all cases implicating free speech doctrine. Paper No. 22 at 23. According to Plaintiffs, the Supreme Court has not attempted to jam all free speech analysis into the "incitement" standard of *Brandenburg*; rather, such analysis is only used in cases dealing with speech on issues of social or political concern, usually in the context of demonstrations and rallies, in which authorities are concerned that matters are about to erupt into violence. Paper No. 22 at 24. This argument fails for two reasons.

First, the *Brandenburg* standard is the appropriate standard in this case because it involves speech which advocate or teaches lawless activity, in this case murder. Secondly, Plaintiffs are correct in pointing out that the *Brandenburg* standard has most often been applied in cases involving political speech. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (stating that political speech lies at the core of the First Amendment); *Carey v. Brown*, 447 U.S. 455, 467 (1980) (indicating that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values). However, this standard is not inherently limited to political speech cases. *See, e.g., DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036, 1040 (R.I. 1982) (parents of a deceased minor brought wrongful death action against NBC after their son hanged himself while imitating a hanging stunt he observed on the Johnny Carson Show); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S.

959 (1988) (court reversed jury's award of damages in a wrongful death action against a magazine publisher for adolescent's death allegedly caused by article which described practice of autoerotic asphyxia); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E. 2d 1067 (Mass. 1989) (wrongful death action by father of boy slain by person who had just seen the film *The Warriors*, which depicted scenes of gang violence, dismissed despite the fact that the perpetrator uttered a line from the film while committing the homicide); *Zamora v. C.B.S. Inc.*, 480 F. Supp. 199 (S.D. Fla. 1979) (fifteen-year-old unsuccessfully sued television networks for violent programming that allegedly caused him to commit criminal acts); *McCollum v. CBS Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988) (Ozzy Osbourne record that included song "Suicide Solution," which exhorted suicide found not actionable); *Olivia N. v. NBC, Inc.*, 178 Cal. Rptr. 188 (Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982) (girl raped with bottle by teenaged girls imitating similar incident depicted on television drama, *Born Innocent*, could not state valid cause of action).

The Court believes that the instant case is very similar to these cases involving violent movies and television programs that were alleged to have caused physical injury or death. *See, e.g., Zamora v. C.B.S. Inc.*, 480 F. Supp. 199 (S.D. Fla. 1979); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E. 2d 1067 (Mass. 1989). Although the programs involved in these cases were not considered to have a "how- to" format like the subject book, they were considered depictions of violence alleged to have been imitated. *See, e.g., Yakubowicz*, 536 NE2d at 1068; *Zamora*, 480 F. Supp. at 200. The Court sees no difference. In these cases, the court examined the speech using the *Brandenburg* standard and determined that it did not constitute incitement.

For example, in *Yakubowicz*, a father whose son was killed by a minor who had attended a showing of the film

"The Warriors" brought a wrongful death action against the distributor of the movie, Paramount Pictures. The court, ruling for the defendants on a motion for summary judgment, said:

> Although the film is rife with violent scenes, it does not at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers. It does not create the likelihood of inciting or producing "imminent lawless action" that would strip the film of First Amendment protection.

Id. at 1071 (citing *Brandenburg*, 395 U.S. at 447).

Plaintiffs have done little to persuade the Court that these cases are not applicable.

Plaintiffs argue that these "copycat" or "imitative harm" cases do not apply because, unlike in this case, the publisher or broadcaster in these cases did not intend that others follow or act upon their depictions. Paper No. 22 at 42. In this case, the Plaintiffs argue, Defendants conceded that they intended that their publications would be used by criminals to plan and execute murder as instructed in the manual. Paper No. 18 at 14; J.S. ¶¶ 4.b, 5.a & 5.b. However, Defendants clarify their concession by explaining that when they published, advertised and distributed both *Hit Man* and *Silencers*, they knew, and in that sense "intended," that the books would be purchased by all of the categories of readers previously described and used by them for the broad range of purposes previously described. *Id.*

Furthermore, in order to justify a claim that speech should be restrained or punished because it was an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct. *McCollum v.*

CBS Inc., 249 Cal. Rptr. 187, 193 (Ct. App. 1988) (citing *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

For example, in *McCollum*, Plaintiffs sued Ozzy Osbourne, a musical performer, and CBS Records, Inc. when their decedent was allegedly caused to commit suicide while listening to a song entitled "Suicide Solution." *Id.* at 191. In finding that there was no intent to produce imminent lawless action, the court reasoned that:

> [T]here is nothing in any of Osbourne's songs which could be characterized as a command to an immediate suicidal act. None of the lyrics relied upon by plaintiffs, even accepting their literal interpretation of the words, purport to order or command anyone to any concrete action at any specific time, much less immediately.

Id. at 193.

While the Defendants have conceded that they intended for their books to be purchased and actually used by criminals, they have not conceded to the requisite intent. Under *Brandenburg*, the Defendants must have intended imminent lawless action. *See, e.g., McCollum*, 249 Cal. Rptr. at 193. In other words, Defendants must have intended that James Perry would go out and murder Mildred Horn, Trevor Horn, and Janice Saunders *immediately*. *Id.* That did not happen in this case since the parties have stipulated to the fact that James Perry committed these atrocious murders a year after receiving the books. J.S. ¶¶ 2, 6. Just as in *McCollum*, nothing in *Hit Man* and *Silencers* could be characterized as a command to immediately murder the three victims. *Id.*

Plaintiffs also argue that even if *Brandenburg* applies, that standard does not bar liability in this action. Paper No. 27 at 7. According to Plaintiffs, the three components of the *Brandenburg* test have been met: 1) intent, 2) imminence, and 3) likelihood. Paper No. 22 at 8. The Court disagrees. First, as discussed above, the intent to

which Defendants have conceded is irrelevant to the Court's analysis. Furthermore, there is no evidence that Defendants intended imminent lawless activity. Secondly, the Court has read the book and concludes that, although morally repugnant, it does not constitute incitement or "a call to action." *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199, 204 (1979) (citing *Yates v. United States*, 354 U.S. 298, 322 (1957)).

Nothing in the book says "go out and commit murder now!" Instead, the book seems to say, in so many words, "if you want to be a hit man this is what you need to do." This is advocacy, not incitement. Advocacy is defined as mere abstract teaching. *Brandenburg*, 395 U.S. at 448 (citing *Noto v. United States*, 367 U.S. 290, 297-298 (1961) (. . . mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action)). The Court finds that the book merely teaches what must be done to implement a professional hit.[4] The book does not cross that

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[4] The title of each chapter listed in the Table of Contents indicates the instructive nature of *Hit Man* as opposed to incitement to imminent lawless activity:

Chapter One: The Beginning—Mental and Physical Preparation

Chapter Two: Equipment—Selection and Purpose

Chapter Three: The Disposable Silencer—A Poor Man's Access to a Rich Man's Toy

Chapter Four: More Than One Way to Kill a Rabbit—The Direct Hit Is Not Your Only Alternative

Chapter Five: Homework and Surveillance—Mapping a Plan and Checking It for Accuracy

Chapter Six: Opportunity Knocks—Finding Employment, What to Charge, What to Avoid

Chapter Seven: Getting the Job Done Right—Why the Described Hit Went Down the Way It Did

Chapter Eight: Danger! Ego, Women and Partners—Controlling Your Situation

Chapter Nine: Legally Illegal—Enjoying the Fruits

line between permissible advocacy and impermissible incitation to crime or violence. *American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976). The book does not purport to order or command anyone to any concrete action at any specific time, much less immediately. *Yakubowicz*, 536 N.E.2d 1067, 1071 (Mass. 1989) (citations omitted); *McCollum v. CBS Inc.*, 249 Cal. Rptr. 187, 193 (Ct. App. 1988).

Nor does the book have a tendency to incite violence. The Court notes that out of the 13,000 copies of *Hit Man* that have been sold nationally, one person actually used the information over the ten years that the book has been in circulation. *See DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036, 1041 (R.I. 1982). The Court also notes that the advertisement in Paladin's mail order catalogue contains the disclaimer "[f]or academic study only." The book itself also contains, in part, the disclaimer "[f]or information purposes only!" This does not indicate a tendency to incite violence. To the contrary, such disclaimers may be interpreted as an attempt to dissuade readers from engaging in the activity it describes. *See Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

The context of the information contained in *Hit Man* and *Silencers* is also significant. The deadly information is contained in books that presumably take time to read. The books are available to an unlimited number of people at different times. At worst the books amount to nothing more than advocacy of illegal action at some indefinite future time. Under these circumstances, it is difficult to find that the books constitute incitement to imminent, lawless activity. *Hess v. Indiana*, 414 U.S. 105, 109 (1973) ("And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had a 'tendency to lead to violence' ").

The Court finds, therefore, applying the standard in *Brandenburg*, and considering the content and the context of the speech in *Hit Man*, that the book does not constitute incitement to imminent lawless action. While the books have proven to contain information which, when it makes its way into the wrong hands, can be fatal, First Amendment protection is not eliminated simply because publication of an idea creates a potential hazard. *Herceg*, 814 F.2d at 1020. It is simply not acceptable to a free and democratic society to limit and restrict creativity in order to avoid dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. *Yakubowicz*, 536 NE2d at 1072 (citing *McCollum v. CBS, Inc.*, 202 Cal. App.3d at 1005-1006, 249 Cal. Rptr. 187).

D. *Soldier of Fortune Cases*

Plaintiffs also urge the Court to be guided by the decisions in the *Soldier of Fortune* cases. *See, e.g., Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993); *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397 (W.D. Ark. 1987). The courts in these cases upheld actions for damages against *Soldier of Fortune* magazine for deaths resulting from the magazine's "gun for hire" advertisements. The defendants in these cases tried unsuccessfully to use the First Amendment as a defense. The Court finds, however, that these cases are inapposite because they involve commercial speech which is afforded limited first amendment protection. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, et al.*, 413 U.S. 376, 385 (1973).

Finally, as the Court noted earlier, this is a novel case with unprecedented future implications. Whether there is a substantial connection or a causal nexus between a publication similar to the material in question and the ultimate acts of criminal defendants who are driven with

animus malus and criminal intent, so as to support civil liability against the publishing company, has yet to be determined.[5] Moreover, the Court suspects that there are a myriad of other complex issues now emerging and which have been spawned by recent electronic technologies, including the Internet and related modes of communication. What is unequivocal, however, is the extensive history throughout this country of permitting the free, open and competitive dissemination of information and ideas. This privilege [and concommitant shield against threats of civil suits] has long been an integral part of the fabric of this nation, and as such has been tenaciously protected by the Courts. As explained in an often quoted statement:

> The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.

Herceg, 814 F.2d at 1019.

IV. *Conclusion*

The Court read *Hit Man* in its entirety. Its content is enough to engender nausea in many readers. This Court, quite candidly, personally finds the book to be reprehensible and devoid of any significant redeeming social value. Nevertheless, however loathsome one characterizes the publication, *Hit Man* simply does not fall within the pa-

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[5] The Court notes further that it has grave reservations as to whether a theory of products liability, as set forth in *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (Md. 1985), would result in strict liability in this case because courts have held that a book is not a product for purposes of products liability law. *See, e.g., Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991).

rameters of any of the recognized exceptions to the general First Amendment principles of freedom of speech. The Court, likewise, declines Plaintiffs invitation to create a new category of speech unprotected by the First Amendment—speech that arguably aids and abets murder.

In summary, the Court believes that Plaintiffs have not made a sufficient showing on this record, as a matter of law, to support their claim that the maintenance of this suit for damages does not infringe upon the First Amendment protection of speech. Accordingly, the Court will grant summary judgment for Defendants.[6]

A separate Order consistent with this Opinion will issue.

Date September 6, 1996

/s/ Alexander Williams, Jr.
ALEXANDER WILLIAMS, JR.
United States District Judge

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[6] Although the Defendant, Peter Lund, has not yet submitted to the jurisdiction of this Court and technically is not before the Court nor is included as the mover of the motions for summary judgment, the Court believes that resolution herein would be dispositive of claims against him. Nevertheless, the Order only affects the consolidated motions filed by the Defendant, Paladin Enterprises, Inc., and is without prejudice as to the defendant, Peter Lund, should he later be served and found to be subject to the personal jurisdiciton of this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. AW 95-3811
(consolidated)

VIVIAN RICE, *et al.*,
Plaintiffs,

v.

PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

Civil Action No. AW 96-444
(consolidated)

MICHAEL D. SAUNDERS, *et al.*,
Plaintiffs,

v.

PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

AMENDED ORDER

For the reasons set forth in the attached Amended Memorandum Opinion, IT IS this 6th day of September, 1996, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That the previous Memorandum Opinion and Order dated August 30, 1996, BE, and the same hereby IS, VACATED;

2. That the Defendant's (Paladin Enterprises, Inc.) consolidated Motions for Summary Judgment BE, and the same hereby ARE, GRANTED;

3. That Judgment BE, and the same hereby IS ENTERED for the Defendant;

4. That the Clerk of the Court CLOSE these cases; and

5. That the Clerk of the Court mail copies of this Order and the attached Amended Memorandum Opinion to all parties of record.

/s/ Alexander Williams, Jr.
ALEXANDER WILLIAMS, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
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v.

PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

ORDER

Upon consideration of Plaintiffs' Motion to Amend Judgment, or alternatively, For Relief from Judgment, and any opposition thereto, and for the reasons set forth in this Court's Memorandum Opinion of this date, IT IS this 6th day of September, 1996, by this Honorable Court,

ORDERED that the Motions to Amend Judgment, or Alternatively, For Relief from Judgment be, and hereby is DENIED, and it is further

ORDERED that the Clerk mail a copy of this Order to all parties of record.

/s/ Alexander Williams, Jr.
ALEXANDER WILLIAMS, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

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Plaintiffs,

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PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Pending before the Court is plantiff's Motion to Amend Judgment, or Alternatively, For Relief from Judgment. The defendant, Paladin Enterprises, Inc., has responded thereto. The Court appreciates that counsel for plaintiffs has pointed out the misunderstanding which possibly occurred during oral argument and has astutely pointed the Court to a recent Maryland case, *Alleco, Inc., et al. v. Harry and Jeanette Weinburg Foundation, Inc., et al.*, 340 Md. 176, 665 A.2d 1038 (1995), which clearly indicates that Maryland recognizes a civil cause of action for aid-

ing and abetting tortious conduct. Both sides also agree that the defendant, Peter C. Lund, has not yet submitted to, nor is yet subject to, the jurisdiction of this Court. As a consequence, summary judgment could only be granted to the defendant, Paladin Enterprises, Inc. The Court has already addressed and corrected both of these issues in its September 5, 1996, (Amended) Memorandum Opinion and Order which vacated the August 30, 1996, Memorandum Opinion and Order.

Notwithstanding the *Alleco* decision relative to the civil action of aiding and abetting tortious conduct, the Court still believes that summary judgment must be granted to Paladin. Even the *Alleco* case emphasizes that the actions of the alleged aider and abetter must involve encouraging and inciting. Without revisiting in detail its Memorandum Opinion, the Court simply will reassert that it believes that the actions herein were at best mere advocacy but fell far short of the incitment required by *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Moreover, the Court has yet to find a case extending civil liabiilty to a publisher for the acts of a murderer who followed the steps outlined in a publication. Having considered the Maryland case law and having re-read the aiding and abetting cases cited by plaintiffs, the Court reaches the same decision as set forth in its Memorandum Opinion. As previously indicated, the Court has already amended its Memorandum Opinion and Order with reference to Maryland law on aiding and abetting. Accordingly, to the extent that plaintiffs' Motion to Amend Judgment, or Alternatively, For Relief from Judgment alters the granting of summary judgment as to Paladin, it is DENIED. A separate Order consistent with this Opinion will follow.

Date September 6th, 1996

/s/ Alexander Williams, Jr.
ALEXANDER WILLIAMS, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. AW 95-3811
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PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs filed wrongful death and survival actions against the Defendants Paladin Enterprises, Inc. ("Paladin"), a book publishing company, and its President, Peter Lund, for the triple murder committed by convicted killer, James Perry, who had purchased two of the Defendants' books prior to committing the murders.[1] Federal juris-

[1] James Perry was convicted in Montgomery County Circuit Court and sentenced to death for killing Mildred Horn, her 8 year old quadriplegic son, Trevor, and the boy's nurse, Janice Saunders. Law-

diction is properly invoked pursuant to 28 U.S.C. § 1332 (a)(1) because the parties are from different states and the amount in controversy exceeds $50,000. According to the Plaintiffs, the Defendants aided and abetted the murders of the three decedents by publishing two books which James Perry consulted to commit the murders: *Hit Man: A Technical Manual for Independent Contractors* ("*Hit Man*") and *How to Make a Disposable Silencer, Vol. II* ("*Silencers*"). The Plaintiffs are also seeking damages in their survival and wrongful death actions based on theories of civil conspiracy, strict liability, and negligence.

Pending before the Court is the Defendants' motion for summary judgment. The Defendants argue, at the outset, that they cannot be held liable for civil damages because they have a First Amendment right to publish these books. The Court has considered the parties respective memoranda and the entire record. The Court has also permitted oral argument by counsel at a hearing conducted on July 22, 1996. For the reasons that follow, the Court will grant the Defendants' motion for summary judgment.

I. *Background*

For the purposes of this motion, the parties have stipulated to the following set of facts. *Hit Man* and *Silencers* were both published in 1983 and, since then, approximately 13,000 copies of each book have been sold nationally. Paladin advertises the book in its mail order catalogue which has the following description:

> HIT MAN
>
> A Technical Manual for Independent Contractors
> *by Rex Feral*

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rence Horn was also convicted in Montgomery County Circuit Court and sentenced to life without the possibility of parole for hiring Perry to commit the murders.

> Rex Feral kills for hire. Some consider him a criminal. Others think him a hero. In truth, he is a lethal weapon aimed at those he hunts. He is a last recourse in these times when laws are so twisted that justice goes unserved. He is a man who feels no twinge of guilt at doing his job. *He is a professional killer.*
>
> Learn how a pro gets assignments, creates a false identity, makes a disposable silencer, leaves the scene without a trace, watches his mark unobserved and more. Feral reveals how to get in, do the job and get out without getting caught. *For academic study only.* 5 1/2 x 8 1/2, softcover, 19 photos, illus., 144 pp.
>
> ISBN 0-87364-276-7 $10.00

Def.'s Ex. 1 at 41.

On the page preceding the table of contents, the following disclaimer appears:

> WARNING
>
> IT IS AGAINST THE LAW TO manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. For informational purposes only!

Def.'s Ex. B at v.

It is undisputed that prior to March 3, 1992, Lawrence Horn began plotting with James Perry of Detroit, Michigan to have Perry murder his ex-wife, Mildren Horn, and his son, Trevor. On or about January 24, 1992, James Perry responded to a catalogue solicitation by the de-

fendant, Paladin, advertising *Hit Man* and *Silencers*. Perry ordered and received both publications. Paladin had no other contact with Perry nor with Lawrence Horn.

On March 3, 1993, James Perry traveled from Detroit, Michigan to Montgomery County, Maryland and murdered Mildren Horn, Trevor Horn, and Janice Saunders, Trevor's private duty nurse. Perry followed a number of instructions outlined in *Hit Man* and *Silencers* in planning, executing and attempting to get away with the murders. However, Defendants had no specific knowledge that either Perry or Horn planned to commit a crime; that Perry and Horn had entered into a conspiracy for the purpose of committing a crime; nor that Perry had been retained by Horn to murder Mildred Horn, Trevor Horn, or Janice Saunders.

Defendants concede, for the purposes of this motion, that in publishing, distributing and selling *Hit Man* and *Silencers* to Perry, they assisted him in the subsequent perpetration of the murders which are the subject of this litigation. For example, each of the excerpts from *Hit Man* listed below was followed by Perry in the planning and execution of the murders for which he was convicted:

> "What other basic equipment will the beginner need as essential tools of his trade? . . . [an] AR-7 rifle." (p. 21)

James Perry used an AR-7 rifle to commit the murders of Mildren Horn and Janice Saunders.

> "The AR-7 rifle is recommended because it is both inexpensive and accurate. The barrel breaks down for storage inside the stock with the clip. It is lightweight and easy to carry or conceal when disassembled." (p. 22)

After the murders, James Perry disassembled the AR-7 rifle as instructed by the Defendants.

> "The AR-7 has a serial number stamped on the case, just above the clip port. This number should be com-

> pletely drilled out. The hole left will be unsightly but will not interfere with the working mechanism of the gun or the clip feed." (p. 23)

James Perry drilled out the serial number of the AR-7 rifle exactly as instructed by the Defendants.

> "The directions and photographs that follow show in explicit detail how to construct a silencer for a Ruger 10/22 rifle. The same directions can be followed successfully to construct a silencer for any weapon, with only the size of the drill rod used for alignment changed to fit the inside dimension of the barrel." (p. 39)

James Perry used a home made silencer which he used to silently kill Mildren Horn and Janice Saunders.

> "Close kills are by far preferred to shots fired over a long distance. You will need to know beyond any doubt that the desired result has been achieved. When using a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. You will not want to be at point blank range to avoid having the victim's blood splatter you or your clothing. At least three shots should be fired to insure quick and sure death. . . aim for the head—preferably the eye sockets if you are a sharpshooter." (p. 24)

James Perry shot Mildren Horn and Janice Perry from a distance of three feet. He shot them each three times in the eyes.

> "Use a rat-tail file, alter the gun barrel, the shell chamber, the loading ramp, the firing pin and the ejector pin. Each one of these items leaves its own definite mark and impression on the shell casing, which if any shells happened to be left behind, can be matched up to the gun under a microscope in a police laboratory. (p. 25) . . . Of primary importance now too, is changing the rifling of the murder

> weapon. This should be done even before you leave the crime scene. That way, even if you get picked up or stopped with the weapon in your possession, its ballistics will not match the bullets you left behind in the mark." (p. 105)

James Perry filed down the parts of the AR-7 Rifle.

Perry followed additional instructional references from *Hit Man* in planning and executing the murders, including how to solicit for and obtain prospective clients in need of murder for hire services; requesting up-front money for expenses; how to register at a motel in the vicinity of the crime, paying with cash and using a fake license tag number; committing the murders at the victims' home; how to make the crime scene look like a burglary; reminding to clean up and carry away the ejected shells; breaking down the gun and discarding the pieces along the roadside after the murders; and using a rental car, a stolen tag on the rental car and the discarding of the tag after the murders.

Paladin engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes. In publishing, marketing, advertising and distributing *Hit Man* and *Silencers*, Paladin intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications.

All parties agree that Paladin's marketing strategy is intended to maximize sales to the public, including authors who desire information for the purpose of writing books about crime and criminals, law enforcement officers and agencies who desire information concerning the means and methods of committing crimes, persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment, persons who fantasize

about committing crimes but do not thereafter commit them, and criminologists and others who study criminal methods and mentality.

II. *Legal Standard*

A. *Summary Judgment Principles*

Summary judgment will be granted when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). While the Court views the underlying facts and all reasonable inferences drawn therefrom in the light most favorable to the opposing party, *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), the mere existence of a "scintilla of evidence" is not enough to frustrate the motion. To defeat a motion for summary judgment, a party must present evidence of specific facts from which the finder of fact could reasonably find for him. *Anderson*, 477 U.S. at 252; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. *First Amendment Freedom of Speech*

The First Amendment to the United States Constitution states that Congress shall make no law abridging the freedom of speech, or of the press. The First Amendment applies to the states through the Fourteenth Amendment. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 n.2 (1980) (Stewart, J., concurring). The imposition of tort liability constitutes state action, so the First Amendment is applicable in this case. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Simply stated, if the Court finds that *Hit Man* is protected by the First Amendment, the Plaintiffs are barred from maintaining tort claims against Paladin. Admittedly,

the Court's task is both novel and awesome; the Court must balance society's interest in compensating injured parties against the freedom of speech guaranteed by the First Amendment. The First Amendment bars the imposition of civil liability on Paladin unless *Hit Man* falls within one of the well-defined and narrowly limited classes of speech that are unprotected by the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

Those classes of speech which receive limited or no First Amendment protection include: (1) obscenity, *Miller v. California*, 413 U.S. 15, 24 (1973); (2) fighting words, *Chaplinsky*, 315 U.S. at 572; (3) libel, *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964); (4) commercial speech, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) and; (5) words likely to incite imminent lawless action, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Hit Man cannot be characterized as obscenity because it does not "depic[t] or describ[e], in a patently offensive way, sexual conduct. . ." *Miller*, 413 U.S. at 24. Nor can it be categorized as fighting words since the words in the book do not, "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572. *Hit Man* clearly is not libelous since it does not tend to injure the reputation of any particular individual. *New York Times*, 376 U.S. at 267.

Hit Man does not fall into the category of commercial speech. It is well settled that commercial speech is speech which does "no more than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, et al.*, 413 U.S. 376, 385 (1973). Commercial speech also provides information for purposes of inviting or enticing one to buy goods or services. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (noting the informational function of commercial speech). Although

Hit Man is published for profit, the book itself cannot be considered an effort to achieve the type of commercial result that an advertisement is designed to achieve. Therefore, the book cannot be characterized as commercial speech.

The Court believes that the only category of unprotected speech under which *Hit Man* could conceivably be placed is incitement to imminent, lawless activity under *Brandenburg*. Therefore, beginning at page 16, the Court will conduct its analysis of whether the book is protected by the First Amendment under the *Brandenburg* standard.

III. *Discussion*

Plaintiffs have essentially advanced five arguments to support its assertion that summary judgment should not be granted in this case. First, Plaintiffs argue that the First Amendment does not protect speech aiding and abetting murder. Paper No. 22 at 2. Plaintiffs' second argument is that the "knowing or reckless disregard for human life" standard of *New York Times* is the appropriate standard to be applied to this case. Paper No. 22 at 26. Third, Plaintiffs contend that the *Brandenburg* standard does not apply. Paper No. 22 at 23. Fourth, they argue that even if the Court finds that *Brandenburg* applies, that standard does not bar liability in this action. Paper No. 22 at 7. Finally, Plaintiffs urge the Court to be guided by the decisions in the *Soldier of Fortune* cases. The Court will address each of these arguments in turn.

A. *Aiding and Abetting*

A brief history of aiding and abetting will serve to guide the Court in its analysis. Aiding and abetting is an ancient criminal law doctrine. *Central Bank v. First Interstate Bank*, 114 S.Ct. 1439, 1450 (1994) (citing *United States v. Peoni*, 100 F.2d 401, 402 (CA2 1938); 1 M. Hale, Pleas of the Crown 615 (1736)). Though there is no federal common law of crimes, Congress in

1909 enacted what is now 18 U.S.C. § 2, a general aiding and abetting statute applicable to all federal criminal offenses. *Central Bank*, 114 S.Ct. at 1450. The statute decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime. *Id.* (citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949).

The Restatement of Torts, under a concert of action principle, accepts a doctrine similar to criminal aiding and abetting. *Central Bank*, 114 S.Ct. at 1450. An actor is liable for harm resulting to a third person from the tortious conduct of another "if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other. . ." *Central Bank*, 114 S.Ct. at 1450 (citing Restatement (Second) of Torts § 876(b) (1977)). However, the doctrine has been at best uncertain in application. The concept of tortious aiding and abetting has turned up frequently in the evaluation of secondary liability for securities law violations, principally in the area of fraud. *Halberstam v. Welch*, 705 F.2d 472, 485 (D.C. Cir. 1983) (citations omitted).

In some states, it is still unclear whether there is aiding and abetting tort liability of the kind set forth in § 876(b) of the Restatement. *Central Bank*, 114 S.Ct. at 1450 (citing *FDIC v. S. Prawer & Co.*, 829 F. Supp. 453, 457 (D. Maine 1993) (in Maine, "[i]t is clear . . . that aiding and abetting liability did not exist under the common law, but was entirely a creature of statute"); *In re Asbestos School Litigation*, 1991 WL 137128 (E.D.Pa. 1991) (cause of action under Restatement § 876 "has not yet been applied as a basis for liability" by Pennsylvania courts); *Meadow Limited Partnership v. Heritage Savings and Loan Assn*, 639 F. Supp. 643, 653 (E.D.Va. 1986) (aiding and abetting tort based on Restatement § 876 not expressly recognized by the state courts of the Common-

wealth of Virginia); *Sloane v. Fauque*, 784 P.2d 895, 896 (1989) (aiding and abetting tort liability is issue "of first impression in Montana").

Plaintiffs argue that *Hit Man* is not protected by the First Amendment because the First Amendment does not protect communication aiding and abetting murder. Paper No. 22 at 2. This argument must fail, however, because Plaintiffs do not cite, nor has the Court located, any reported decision that suggests that Maryland recognizes the tort of aiding and abetting.[2] A federal court sitting in diversity cannot create new causes of action. *Guy v. Travenol Laboratories, Inc.*, 812 F.2d 911 (4th Cir. 1987); *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14, 15 (1st Cir. 1976); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949). Therefore, the Court cannot create a cause of action for aiding and abetting under Maryland law, nor can the Court create another category of unprotected speech, i.e. speech that aids and abets murder.

Plaintiffs rely on *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982) and *United States v. Buttorff*, 572

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[2] At least one court has imposed civil liability for murder on an aiding and abetting theory. *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). In *Halberstam*, the defendant was the live-in companion of a burglar who committed murder during the course of a burglary. *Id.* at 475. The court held that the defendant was liable for the murder because she knowingly and substantially assisted the burglar in his illicit trade. *Id.* at 487.

Aiding and abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation. *Halberstam*, 705 F.2d at 477 (citing *Investors Research Corp. v. SEC*, 628 F.2d 168, 178 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94-95 (5th Cir. 1975); *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139, 162-63 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974)).

F.2d 619 (8th Cir. 1978) *cert. denied*, 437 U.S. 906 (1978) for the proposition that criminal or tort liability may not be avoided merely because the wrongdoer uses speech to accomplish his illicit purpose. Paper No. 22 at 5. In *Barnett*, the defendant was the publisher of an instruction manual on how to manufacture the illegal drug known as PCP. Another person obtained the defendant's instruction manual and was caught in the act of manufacturing the illegal drugs. *Barnett*, 667 F.2d at 838. The defendant was prosecuted for aiding and abetting the manufacture of PCP. The defendant argued that evidence seized at the crime scene should be suppressed because the defendant had a First Amendment right to print the manual. The Court stated that:

> To the extent, however, that Barnett appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct.

Barnett, 667 F.2d at 843.

Plaintiffs took great pains to outline the parallels between *Barnett* and the instant case: 1) defendants in both cases published and advertised step-by-step instructions on how to commit crimes; 2) defendants in both cases mailed an instruction manual to an unknown person who responded to the advertisement; and 3) perpetrators in both cases followed the step-by-step instructions to commit the crimes. Paper No. 23 at 3. One very important distinction, however, is that *Barnett* is a criminal case where the defendant publisher was charged with criminal aiding and abetting pursuant to 18 U.S.C. § 2. Here, Defendants are not being charged with the crime of aiding and abetting. Rather, Plaintiffs are asking the Court to allow the Defendants to be subjected to civil liability for murder, based on a theory of civil aiding and abetting—a claim that does not exist under Maryland law.

Similarly, in *Buttorff*, the defendants were convicted of aiding and abetting persons who filed false or fraudulent tax returns. *Buttorff*, 572 F.2d at 621. The defendants offered detailed instructions at large public meetings on how to illegally avoid paying taxes. *Id.* at 622. As a result, several individuals engaged in the illegal practices. *Id.* The court rejected the defendants' First Amendment defense and held that:

> Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. . . This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.

Buttorff, 572 F.2d at 624.

While these cases are factually similar, as stated above, Plaintiffs have cited no authority that would allow the Court to apply the holdings in these criminal cases to the facts of the instant case. Furthermore, the court in *Buttorff* applied the *Brandenburg* incitement standard and found that the defendants' speech went beyond mere advocacy to incitement of lawless activity. Therefore, the court held, defendants were not entitled to a First Amendment defense. *Id.* The failure of the First Amendment defense in the *Buttorff* case turned on the court's finding that the subject speech went beyond mere advocacy. Even if *Buttorff* applied in this case, it is not dispositive of a finding that the First Amendment acts as a bar to liability in the instant case.

B. *The New York Times v. Sullivan Standard*

The Plaintiffs posit that the *New York Times v. Sullivan*, 376 U.S. 254 (1964) standard applies to this case. Paper No. 22 at 25. In *New York Times*, the court held

that, in order to recover damages in a libel action, a public official must show actual malice or that a statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. *Id.* at 279. Plaintiffs argue that if the First Amendment permits defendants guilty of knowing or reckless misconduct to be held liable in tort for millions of dollars in damages when their publications cause injury to reputation and its attendant emotional harm as in the *New York Times* case, then of course the First Amendment must permit parallel liability in tort when publications cause physical injury and death.

According to Plaintiffs, the appropriate standard to be applied in the case at bar is "knowing or reckless disregard for human life." Paper No. 22 at 26. However, the Plaintiffs cite no authority for this novel proposition. Furthermore, the Court finds that *New York Times v. Sullivan* is inapposite because, unlike the instant case, that case involved speech that tends to injure the reputation of a particular individual. The holding in that case has no bearing on the facts of this case.

Plaintiffs rely heavily on *Weirum v. RKO General, Inc.*, 15 Cal.3d 40, (1975) for the proposition that defendants can be held liable for physical injury caused by their words. In *Weirum*, the court affirmed an award of damages to the plaintiff in a wrongful death action against a radio station. The decedent was negligently forced off a highway by a listener to defendant's radio station which was conducting a contest rewarding the first contestant to locate a disc jockey travelling throughout the listening area. The court rejected the station's First Amendment defense, stating that

> "[d]efendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. . . The First Amendment does not sanction the inflic-

> tion of physical injury merely because achieved by word, rather than act." *Id.* at 48.

Weirum can be distinguished from the instant case because the Weirum broadcasts actively and repeatedly encouraged listeners to speed to announced locations. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner. No such urging occurred in this case.

The Plaintiffs go on to cite several cases where the Supreme Court has approved civil liability sounding in tort, contract, and statutory causes of action despite the defendants' attempt to assert a First Amendment defense.[3] The Court agrees with Plaintiffs that a defendant does not enjoy absolute immunity from criminal or tort liability merely because he uses speech. The critical issue, however, is whether that speech is protected by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).

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[3] *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-79 (1977) (holding that First Amendment did not protect defendants from liability under the common-law tort of "appropriation" or "right of publicity" when news media filmed plaintiff's "human cannonball" act at a county fair and broadcast the act without the plaintiff's permission, and reasoning that it was enough that defendants knew that the plaintiff objected to the broadcast and went forward anyway); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667-72 (holding that the First Amendment does not bar application of ordinary principles of state contract and promissory estoppel law in suit against newspaper for breaching promise of confidentiality and printing a source's name); *Goldstein v. California*, 412 U.S. 546, 571 (1973) (upholding California's "record piracy" law, noting that "[n]o restraint has been placed on the use of an idea or concept"); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 568 (1985) (upholding copyright infringement action against *The Nation* magazine for printing excerpts from President Gerald Ford's memoirs, holding that the First Amendment did not shield the magazine from the normal principles of copyright liability); *Snepp v. United States*, 444 U.S. 507, 511-16 (1980) (upholding constructive trust on defendants' book royalties for book published in violation of preclearance agreement with CIA).

C. *The Brandenburg Standard*

The Court must analyze the character of the words used in *Hit Man*, using the appropriate standard, and then decide whether that type of speech is protected by the First Amendment. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984). The Court finds that, of the five classes of speech which states may proscribe within First Amendment guidelines, the only one under which Plaintiffs could conceivably maintain this action is incitement to imminent, lawless activity under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See, e.g., Hess v. Indiana*, 414 U.S. 105 (1973); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036, 1040 (R.I. 1982).

In *Brandenburg*, a Ku Klux Klan leader was convicted under the Ohio criminal syndicalism statute for assembling with others at a rally and saying, among other things:

> "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible there might have to be some revengence taken."

Id. at 446.

The statute at issue in that case prohibited:

> "[A]dvocat[ing]. . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. . . and voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

The Supreme Court reversed the conviction holding that:

> The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or

> producing imminent lawless action and is likely to incite or produce such action.

395 U.S. at 447.

The Supreme Court distinguished between speech which merely advocates law violation and speech which incites imminent lawless activity; the former is protected, but the latter is not. *Id.* at 448. The court reasoned that a statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. *Id.* The court found that the words spoken by the Klansman amounted to mere advocacy, and the statute which punished such speech was unconstitutional. *Id.* at 449.

The Court must decide, therefore, whether *Hit Man* merely advocates or teaches murder or whether it incites or encourages murder. *Id.* The Court must examine not only the content of the speech in this case, but also the context in which it was disseminated. *See, e.g., American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) ("[T]he line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 n. 50 (1982) (". . . [T]he question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated' . . . In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect) (citations omitted).

Plaintiffs argue that the *Brandenburg* standard is not a First Amendment "universal," applied in all cases implicating free speech doctrine. Paper No. 22 at 23. According to Plaintiffs, the Supreme Court has not attempted to jam all free speech analysis into the "incitement" standard

of *Brandenburg*; rather, such analysis is only used in cases dealing with speech on issues of social or political concern, usually in the context of demonstrations and rallies, in which authorities are concerned that matters are about to erupt into violence. Paper No. 22 at 24. This argument fails for two reasons.

First, the *Brandenburg* standard is the appropriate standard in this case because it involves speech which advocates or teaches lawless activity, in this case murder. Secondly, Plaintiffs are correct in pointing out that the *Brandenburg* standard has most often been applied in cases involving political speech. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (stating that political speech lies at the core of the First Amendment); *Carey v. Brown*, 447 U.S. 455, 467 (1980) (indicating that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values). However, this standard is not inherently limited to political speech cases. *See, e.g., DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036, 1040 (R.I. 1982) (parents of a deceased minor brought wrongful death action against NBC after their son hanged himself while imitating a hanging stunt he observed on the Johnny Carson Show); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (court reversed jury's award of damages in a wrongful death action against a magazine publisher for adolescent's death allegedly caused by article which described practice of autoerotic asphyxia); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E. 2d 1067 (Mass. 1989) (wrongful death action by father of boy slain by person who had just seen the film *The Warriors*, which depicted scenes of gang violence, dismissed despite the fact that the perpetrator uttered a line from the film while committing the homicide); *Zamora v. C.B.S. Inc.*, 480 F. Supp. 199 (S.D. Fla. 1979) (fifteen-year-old unsuccessfully sued television networks for violent programming that allegedly caused him to commit criminal acts);

McCollum v. CBS Inc., 249 Cal. Rptr. 187 (Ct. App. 1988) (Ozzy Ozbourne record that included song "Suicide Solution," which exhorted suicide found not actionable); *Olivia N. v. NBC, Inc.*, 178 Cal. Rptr. 188 (Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982) (girl raped with bottle by teenaged girls imitating similar incident depicted on television drama, *Born Innocent*, could not state valid cause of action).

The Court believes that the instant case is very similar to these cases involving violent movies and television programs that were alleged to have caused physical injury or death. *See, e.g., Zamora v. C.B.S. Inc.*, 480 F. Supp. 199 (S.D. Fla. 1979); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E. 2d 1067 (Mass. 1989). Although the programs involved in these cases were not considered to have a "how- to" format like the subject book, they were considered depictions of violence alleged to have been imitated. *See, e.g., Yakubowicz*, 536 NE2d at 1068; *Zamora*, 480 F. Supp. at 200. The Court sees no difference. In these cases, the court examined the speech using the *Brandenburg* standard and determined that it did not constitute incitement.

For example, in *Yakubowicz*, a father whose son was killed by a minor who had attended a showing of the film "The Warriors" brought a wrongful death action against the distributor of the movie, Paramount Pictures. The court, ruling for the defendants on a motion for summary judgment, said:

> Although the film is rife with violent scenes, it does not at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers. It does not create the likelihood of inciting or producing "imminent lawless action" that would strip the film of First Amendment protection.

Id. at 1071 (citing *Brandenburg*, 395 U.S. at 447). Plaintiffs have done little to persuade the Court that these cases are not applicable.

Plaintiffs argue that these "copycat" or "imitative harm" cases do not apply because, unlike in this case, the publisher or broadcaster in these cases did not intend that others follow or act upon their depictions. Paper No. 22 at 42. In this case, the Plaintiffs argue, Defendants conceded that they intended that their publications would be used by criminals to plan and execute murder as instructed in the manual. Paper No. 18 at 14; J.S. ¶¶ 4.b, 5.a & 5.b. However, Defendants clarify their concession by explaining that when they published, advertised and distributed both *Hit Man* and *Silencers*, they knew, and in that sense "intended," that the books would be purchased by all of the categories of readers previously described and used by them for the broad range of purposes previously described. *Id.*

Furthermore, in order to justify a claim that speech should be restrained or punished because it was an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct. *McCollum v. CBS Inc.*, 249 Cal. Rptr. 187, 193 (Ct. App. 1988) (citing *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

For example, in *McCollum*, Plaintiffs sued Ozzy Osbourne, a musical performer, and CBS Records, Inc. when their decedent was allegedly caused to commit suicide while listening to a song entitled "Suicide Solution." *Id.* at 191. In finding that there was no intent to produce imminent lawless action, the court reasoned that:

> [T]here is nothing in any of Osbourne's songs which could be characterized as a command to an immediate suicidal act. None of the lyrics relied upon by plaintiffs, even accepting their literal interpretation of the words, purport to order or command anyone

> to any concrete action at any specific time, much less immediately.

Id. at 193.

While the Defendants have conceded that they intended for their books to be purchased and actually used by criminals, they have not conceded to the requisite intent. Under *Brandenburg*, the Defendants must have intended imminent lawless action. *See, e.g., McCollum*, 249 Cal. Rptr. at 193. In other words, Defendants must have intended that James Perry would go out and murder Mildred Horn, Trevor Horn, and Janice Saunders *immediately*. *Id.* That did not happen in this case since the parties have stipulated to the fact that James Perry committed these atrocious murders a year after receiving the books. J.S. ¶¶ 2, 6. Just as in *McCollum*, nothing in *Hit Man* and *Silencers* could be characterized as a command to immediately murder the three victims. *Id.*

Plaintiffs also argue that even if *Brandenburg* applies, that standard does not bar liability in this action. Paper No. 22 at 7. According to Plaintiffs, the three components of the *Brandenburg* test have been met: 1) intent, 2) imminence, and 3) likelihood. Paper N. 22 at 8. The Court disagrees. First, as discussed above, the intent to which Defendants have conceded is irrelevant to the Court's analysis. Furthermore, there is no evidence that Defendants intended imminent lawless activity. Secondly, the Court has read the book and concludes that, although morally repugnant, it does not constitute incitement or "a call to action." *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199, 204 (1979) (citing *Yates v. United States*, 354 U.S. 298, 322 (1957)).

Nothing in the book says "go out and commit murder now!" Instead, the book seems to say, in so many words, "if you want to be a hit man this is what you need to do." This is advocacy, not incitement. Advocacy is defined as mere abstract teaching. *Brandenburg*, 395 U.S. at 448 (citing *Noto v. United States*, 367 U.S. 290, 297-298

(1961) (. . . mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action)). The Court finds that the book merely teaches what must be done to implement a professional hit.[4] The book does not cross that line between permissible advocacy and impermissible incitation to crime or violence. *American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976). The book does not purport to order or command anyone to any concrete action at any specific time, much less immediately. *Yakubowicz*, 536 NE2d 1067, 1071 (Mass. 1989) (citations omitted); *McCollum v. CBS Inc.*, 249 Cal. Rptr. 187, 193 (Ct. App. 1988).

Nor does the book have a tendency to incite violence. The Court notes that out of the 13,000 copies of *Hit Man* that have been sold nationally, one person actually used the information over the ten years that the book has been in circulation. *See DeFilippo v. National Broadcasting*

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[4] The title of each chapter listed in the Table of Contents indicates the instructive nature of *Hit Man* as opposed to incitement to imminent lawless activity:

Chapter One: The Beginning—Mental and Physical Preparation

Chapter Two: Equipment—Selection and Purpose

Chapter Three: The Disposable Silencer—A Poor Man's Access to a Rich Man's Toy

Chapter Four: More Than One Way to Kill a Rabbit—The Direct Hit Is Not Your Only Alternative

Chapter Five: Homework and Surveillance—Mapping a Plan and Checking It for Accuracy

Chapter Six: Opportunity Knocks—Finding Employment, What to Charge, What to Avoid

Chapter Seven: Getting the Job Done Right—Why the Described Hit Went Down the Way It Did

Chapter Eight: Danger! Ego, Women and Partners—Contrilling Your Situation

Chapter Nine: Legally Illegal—Enjoying the Fruits

Co., 446 A.2d 1036, 1041 (R.I. 1982). The Court also notes that the advertisement in Paladin's mail order catalogue contains the disclaimer "[f]or academic study only." The book itself also contains, in part, the disclaimer "[f]or information purposes only!" This does not indicate a tendency to incite violence. To the contrary, such disclaimers may be interpreted as an attempt to dissuade readers from engaging in the activity it describes. *See Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

The context of the information contained in *Hit Man* and *Silencers* is also significant. The deadly information is contained in books that presumably take time to read. The books are available to an unlimited number of people at different times. At worst the books amount to nothing more than advocacy of illegal action at some indefinite future time. Under these circumstances, it is difficult to find that the books constitute incitement to imminent, lawless activity. *Hess v. Indiana*, 414 U.S. 105, 109 (1973) ("And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had a 'tendency to lead to violence' ").

The Court finds, therefore, applying the standard in *Brandenburg*, and considering the content and the context of the speech in *Hit Man*, that the book does not constitute incitement to imminent lawless action. While the books have proven to contain information which, when it makes its way into the wrong hands, can be fatal, First Amendment protection is not eliminated simply because publication of an idea creates a potential hazard. *Herceg*, 814 F.2d at 1020. It is simply not acceptable to a free and democratic society to limit and restrict creativity in order to avoid dissemination of ideas in artistic speech which may adversely affect emotionally troubled individ-

uals. *Yakubowicz*, 536 NE2d at 1072 (citing *McCollum v. CBS, Inc.*, 202 Cal. App.3d at 1005-1006, 249 Cal. Rptr. 187).

D. *Soldier of Fortune Cases*

Plaintiffs also urge the Court to be guided by the decisions in the *Soldier of Fortune* cases. *See, e.g., Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993); *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397 (W.D. Ark. 1987). The courts in these cases upheld actions for damages against *Soldier of Fortune* magazine for deaths resulting from the magazine's "gun for hire" advertisements. The defendants in these cases tried unsuccessfully to use the First Amendment as a defense. The Court finds, however, that these cases are inapposite because they involve commercial speech which is afforded limited first amendment protection. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, et al.*, 413 U.S. 376, 385 (1973).

Finally, as the Court noted earlier, this is a novel case with unprecedented future implications. Whether there is a substantial connection or a causal nexus between a publication similar to the material in question and the ultimate acts of criminal defendants who are driven with *animus malus* and criminal intent, so as to support civil liability against the publishing company, has yet to be determined.[5] Moreover, the Court suspects that there are a myriad of other complex issues now emerging and which have been spawned by recent electronic technologies, including the Internet and related modes of com-

[5] The Court notes further that it has grave reservations as to whether a theory of products liability, as set forth in *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (Md. 1985), would result in strict liability in this case because courts have held that a book is not a product for purposes of products liability law. *See, e.g., Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991).

munication. What is unequivocal, however, is the extensive history throughout this country of permitting the free, open and competitive dissemination of information and ideas. This privilege [and concommitant shield against threats of civil suits] has long been an integral part of the fabric of this nation, and as such has been tenaciously protected by the Courts. As explained in an often quoted statement:

> The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.

Herceg, 814 F.2d at 1019.

IV. *Conclusion*

The Court read *Hit Man* in its entirety. Its content is enough to engender nausea in many readers. This Court, quite candidly, personally finds the book to be reprehensible and devoid of any significant redeeming social value. Nevertheless, however loathsome one characterizes the publication, *Hit Man* simply does not fall within the parameters of any of the recognized exceptions to the general First Amendment principles of freedom of speech. The Court, likewise, declines Plaintiffs invitation to create a new category of speech unprotected by the First Amendment—speech that arguably aids and abets murder.

In summary, the Court believes that Plaintiffs have not made a sufficient showing on this record, as a matter of law, to support their claim that the maintenance of this suit for damages does not infringe upon the First Amendment protection of speech. Accordingly, the Court will grant summary judgment for Defendants.

A separate Order consistent with this Opinion will issue.

/s/ Alexander Williams, Jr.
ALEXANDER WILLIAMS, JR.
United States District Judge

Date August 30th, 1996

[Filed Aug. 30, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Civil Action No. AW 95-3811
(consolidated)

VIVIAN RICE, *et al.*,
Plaintiffs,

v.

PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

Civil Action No. AW 96-444
(consolidated)

MICHAEL D. SAUNDERS, *et al.*,
Plaintiffs,

v.

PALADIN ENTERPRISES, INC., *et al.*,
Defendants.

ORDER

For the reasons set forth in the attached Memorandum Opinion, IT IS, this *30th* day of August, 1996, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That the Defendants' Motion for Summary Judgment BE, and the same hereby IS, GRANTED;

2. That Judgment BE, and the same hereby IS ENTERED for the Defendants;

3. That the Clerk of the Court CLOSE these cases; and

4. That the Clerk of the Court mail copies of this Order and the attached Memorandum Opinion to all parties of record.

/s/ Alexander Williams, Jr.
ALEXANDER WILLIAMS, JR.
United States District Judge

FILED: November 26, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2412
(CA-95-3811-AW)

VIVIAN RICE, Guardian and next friend of Tamielle Horn; MARILYN FARMER, Co-personal representative of the estate of Mildred Horn; TIFFANI M. HORN, Co-personal representative of the estate of Mildred Horn; MICHAEL D. SAUNDERS, Individually and next friend of Colin D. Saunders, a minor, and personal representative of the estate of Janice Y. Saunders; COLIN D. SAUNDERS; JANICE Y. SAUNDERS,

Plaintiffs-Appellants,

versus

THE PALADIN ENTERPRISES, INCORPORATED, a/k/a The Paladin Press,

Defendant-Appellee,

and

PETER C. LUND,

Defendant,

DAVID CRUMP, Professor of Constitutional Law and Recipient of "Friend of the First Amendment" Award; NATIONAL VICTIM CENTER; STEPHANIE ROPER FOUNDATION, INCORPORATED; VICTIMS RIGHTS POLITICAL ACTION COMMITTEE; THE HORROR WRITERS ASSOCIATION; THE THOMAS JEFFERSON CENTER FOR THE PRO-

TECTION OF FREE EXPRESSION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITOL AREA; AMERICAN CIVIL LIBERTIES UNION OF COLORADO; ABC, INCORPORATED; AMERICA ONLINE, INCORPORATED; ASSOCIATION OF AMERICAN PUBLISHERS; THE BALTIMORE SUN COMPANY; E.W. SCRIPPS COMPANY; FREEDOM TO READ FOUNDATION; MAGAZINE PUBLISHERS OF AMERICA, INCORPORATED; MCCLATCHY NEWSPAPFRS, INCORPORATED; MEDIA GENERAL, INC.; MEDIA PROFESSIONAL INSURANCE; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSPAPERS ASSOCIATION OF AMERICA; THE NEW YORK TIMES; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; THE WASHINGTON POST,
Amici Curiae.

ORDER

Paladin Enterprises has filed with the court a petition for rehearing, together with a suggestion for rehearing en banc. The court hereby requests the views of the United States with respect to the court's further consideration of this case.

For the Court

/s/ Patricia S. Connor
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Patricia S. Connor
Clerk

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November 26, 1997

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Re: 96-2412 Rice v. Paladin Enterprises
CA-95-3811-AW
CA-96-444-AW

Dear Counsel:

The Court has directed me to obtain an answer to the petition for rehearing with suggestion for rehearing in

banc. The original and 20 copies of the answer must be filed in the Office of the Clerk by 12/8/97.

Yours truly,

PATRICIA S. CONNOR
Clerk

By: /s/ Sue Nagle
Deputy Clerk

FILED December 12, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2412
CA-95-3811-AW
CA-96-444-AW

VIVIAN RICE, Guardian and next friend of Tamielle Horn; MARILYN FARMER, Co-personal representatives of the estate of Mildred Horn; TIFFANI M. HORN, Co-personal representatives of the estate of Mildred Horn; MICHAEL D. SAUNDERS, Individually and next friend of Colin D. Saunders, a minor, and personal representative of the estate of Janice Y. Saunders; COLIN D. SAUNDERS; JANICE Y. SAUNDERS,

Plaintiffs-Appellants

v.

THE PALADIN ENTERPRISES, INCORPORATED, a/k/a The Paladin Press,

Defendant-Appellee

and

PETER C. LUND,

Defendant

DAVID CRUMP, Professor of Constitutional Law and Recipient of "Friend of the First Amendment" Award; NATIONAL VICTIM CENTER; STEPHANIE ROPER FOUNDATION, INCORPORATED; VICTIMS RIGHTS POLITICAL ACTION COMMITTEE; THE HORROR WRITERS ASSOCIATION; THE THOMAS JEFFERSON CENTER FOR THE PRO-

TECTION OF FREE EXPRESSION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITOL AREA; AMERICAN CIVIL LIBERTIES UNION OF COLORADO; ABC, INCORPORATED; AMERICA ONLINE, INCORPORATED; ASSOCIATION OF AMERICAN PUBLISHERS; THE BALTIMORE SUN COMPANY; E.W. SCRIPPS COMPANY; FREEDOM TO READ FOUNDATION; MAGAZINE PUBLISHERS OF AMERICA, INCORPORATED; MCCLATCHY NEWSPAPERS, INCORPORATED; MEDIA GENERAL, INC.; MEDIA PROFESSIONAL INSURANCE; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSPAPERS ASSOCIATION OF AMERICA; THE NEW YORK TIMES; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; THE WASHINGTON POST,

Amici Curiae

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court

/s/ Patricia S. Connor
Clerk

FILED December 22, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2412
CA-95-3811-AW
CA-96-444-AW

RICE

v.

PALADIN ENTERPRISES

MANDATE

The judgment of this Court dated 11/10/97 takes effect today.

PATRICIA S. CONNOR
Clerk

REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

PREPARED BY THE UNITED STATES DEPARTMENT OF JUSTICE
AS REQUIRED BY SECTION 709(a) OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

SUBMITTED TO

THE UNITED STATES HOUSE OF REPRESENTATIVES
AND THE UNITED STATES SENATE

APRIL 1997

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INTRODUCTION AND SUMMARY

In section 709(a) of the Antiterrorism and Effective Death Penalty Act of 1996 ["the AEDPA"], Pub. L. No. 104-132, 110 Stat. 1214, 1297 (1996), Congress provided that, in consultation with such other officials and individuals as she considers appropriate, the Attorney General shall conduct a study concerning—

> (1) the extent to which there is available to the public material in any medium (including print, electronic, or film) that provides instruction on how to make bombs, destructive devices, or weapons of mass destruction;
>
> (2) the extent to which information gained from such material has been used in incidents of domestic or international terrorism;
>
> (3) the likelihood that such information may be used in future incidents of terrorism;
>
> (4) the application of Federal laws in effect on the date of enactment of this Act to such material;
>
> (5) the need and utility, if any, for additional laws relating to such material; and
>
> (6) an assessment of the extent to which the first amendment protects such material and its private and commercial distribution.

Section 709(b) of the AEDPA, in turn, requires the Attorney General to submit to the Congress a report containing the results of the study, and to make that report available to the public.

Following enactment of the AEDPA, a committee was established within the Department of Justice ["the DOJ Committee"], comprised of departmental attorneys as well as law enforcement officials of the Federal Bureau of Investigation and the Treasury Department's Bureau of Alcohol, Tobacco and Firearms. The committee members

divided responsibility for undertaking the tasks mandated by section 709. Some members canvassed reference sources, including the Internet, to determine the facility with which information relating to the manufacture of bombs, destructive devices and other weapons of mass destruction could be obtained. Criminal investigators reviewed their files to determine the extent to which such published information was likely to have been used by persons known to have manufactured bombs and destructive devices for criminal purposes. And legal experts within the Department of Justice reviewed extant federal criminal law and judicial precedent to assess the extent to which the dissemination of bombmaking information is now restricted by federal law, and the extent to which it may be restricted, consistent with constitutional principles. This Report summarizes the results of these efforts.

As explained in this Report, the DOJ committee has determined that anyone interested in manufacturing a bomb, dangerous weapon, or a weapon of mass destruction can easily obtain detailed instructions from readily accessible sources, such as legitimate reference books, the so-called underground press, and the Internet. Circumstantial evidence suggests that, in a number of crimes involving the employment of such weapons and devices, defendants have relied upon such material in manufacturing and using such items. Law enforcement agencies believe that, because the availability of bombmaking information is becoming increasingly widespread (over the Internet and from other sources), such published instructions will continue to play a significant role in aiding those intent upon committing future acts of terrorism and violence.

While current federal laws—such as those prohibiting conspiracy, solicitation, aiding and abetting, providing material support for terrorist activities, and unlawfully furthering civil disorders—may, in some instances, proscribe the dissemination of bombmaking information, no

extant federal statute provides a satisfactory basis for prosecution in certain classes of cases that Senators Feinstein and Biden have identified as particularly troublesome. Senator Feinstein introduced legislation during the last Congress in an attempt to fill this gap. The Department of Justice agrees that it would be appropriate and beneficial to adopt further legislation to address this problem directly, if that can be accomplished in a manner that does not impermissibly restrict the wholly legitimate publication and teaching of such information, or otherwise violate the First Amendment.

The First Amendment would impose substantial constraints on any attempt to proscribe indiscriminately the dissemination of bombmaking information. The government generally may not, except in rare circumstances, punish persons either for advocating lawless action or for disseminating truthful information—including information that would be dangerous if used—that such persons have obtained lawfully. However, the constitutional analysis is quite different where the government punishes speech that is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit; such "speech acts"—for instance, many cases of inchoate crimes such as aiding and abetting and conspiracy—may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such "conduct" takes the form of speech.

Accordingly, we have concluded that Senator Feinstein's proposal can withstand constitutional muster in most, if not all, of its possible applications, if such legislation is slightly modified in several respects that we propose at the conclusion of this Report. As modified, the proposed legislation would be likely to maximize the ability of the Federal Government—consistent with free speech protections—to reach cases where an individual disseminates information on how to manufacture or use explosives or weapons of mass destruction either (i) with the intent that the information be used to facilitate criminal conduct,

or (ii) with the knowledge that a particular recipient of the information intends to use it in furtherance of criminal activity.

BACKGROUND

In order fully to understand the issues we have been asked to address, it is helpful first to describe the legislative proceedings that prompted enactment of section 709 of the AEDPA.

On May 11, 1995, less than one month after the Oklahoma City terrorist bombing, in testimony before the Subcommittee on Terrorism, Technology and Government Information of the Senate Judiciary Committee, Deputy Assistant Attorney General Robert Litt, of the Justice Department's Criminal Division, explained that "how to" guides for the manufacture of explosives are readily available on the Internet, in bookstores and even in public libraries.[1] To illustrate the point, he observed that, according to a news article, only hours after the Oklahoma City bombing, someone posted on the Internet directions —including a diagram—explaining how to construct a bomb of the type that was used in that tragic act of terrorism. Another Internet posting offered not only information concerning how to build bombs, but also instructions as to how the device used in the Oklahoma City bombing could have been improved.

Mr. Litt explained that "expansion of the scope of federal criminal laws dealing with the violent, terrorist activity will permit the Department of Justice to prosecute those who engage in efforts to assist violence and terrorism over the Internet." Mr. Litt observed, however, that despite the dangers posed by the dissemination of

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[1] *See* Statement of Robert S. Litt, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, in *Mayhem Manuals and the Internet: Hearings Before the Subcomm. on Terrorism, Technology and Government Information of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995).

such information and the callous disregard of human life shown by those who are responsible for such action, the First Amendment imposes significant constraints on the ability of the federal government to proscribe and penalize such activity.

On June 5, 1995, Senator Feinstein proposed an amendment to a bill (S. 735) that later became the AEDPA. 141 Cong. Rec. S7682 (daily ed. June 5, 1995). The purpose of the amendment was to address the problem of the increasingly widespread "distribution of bombmaking information for criminal purposes." *Id.* Following some debate in the Senate, Senator Feinstein's amendment was slightly modified, and the full Senate unanimously approved it by voice vote. *Id.* at S7686. The Senate passed S. 735 on June 7, 1995. 141 Cong. Rec. S7857 (daily ed.). As passed by the Senate, the Feinstein amendment would have amended 18 U.S.C. § 842 to add a new prohibition:

> It shall be unlawful for any person to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, if the person intends or knows, that such explosive materials or information will likely be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a criminal purpose affecting interstate commerce.

Id. at S7875. In conference committee, this prohibition ["the Feinstein Amendment"] was removed from the bill and was replaced with section 709 of the AEDPA—the requirement for the Attorney General's study and report, quoted above. 142 Cong. Rec. H3336 (daily ed. Apr. 15, 1996). Senator Biden then moved to recommit the conference report to the conference committee with instructions to the Senate managers to insist on insertion of the Feinstein Amendment. 142 Cong. Rec. S3448 (daily

ed. Apr. 17, 1996). Senator Hatch moved to table Senator Biden's motion, and Senator Hatch's motion was agreed to by a vote of 51 to 48. *Id.* at S3450.

Two months later, Senator Feinstein revived her proposal, and the Senate unanimously agreed to include it as an amendment to a bill that later became the National Defense Authorization Act for Fiscal Year 1997. 142 Cong. Rec. S7271-74 (daily ed. June 28, 1996). Once again, however, the Feinstein Amendment was removed in conference. 142 Cong. Rec. H9303 (daily ed. July 30, 1996).

I. THE PUBLIC AVAILABILITY OF INFORMATION ON THE MANUFACTURE OF BOMBS, DESTRUCTIVE DEVICES, AND WEAPONS OF MASS DESTRUCTION

The first question that section 709 required the Attorney General to study concerns the availability of instructional information describing the fabrication of explosives, destructive devices and other weapons of mass destruction. Our study confirms that any member of the public who desires such information can readily obtain it.

A. *Books, Pamphlets and Other Printed Material.* Most strikingly, a cursory search of the holdings of the Library of Congress located at least 50 publications substantially devoted to such information, all readily available to any member of the public interested in reading them and copying their contents. The titles of a number of these publications are indicative of their contents.[2] They include:

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[2] The DOJ Committee considered carefully the question whether the inclusion in this Report of titles of, and illustrative excerpts from, bombmaking texts would enhance the availability of such information to persons bent upon fabricating bombs and other destructive devices. The Committee concluded that such information already is so readily available to such individuals that its publication

—*Guerilla's Arsenal: Advanced Techniques For Making Explosives and Time-delay Bombs* (Paladin Press, 1994);

—*The Anarchist Arsenal* (Harber, 1992);

—*Deadly Brew: Advanced Improvised Explosives* (Paladin Press, 1987);

—*The Anarchist's Handbook* (J. Flores, 1995);

—*Improvised Explosives: How To Make Your Own* (Paladin Press, 1985); and

—*Ragnar's Guide to Home and Recreational Use of High Explosives* (Paladin Press, 1988).

Other texts, intended for military training, agricultural and engineering use, contain information equally useful to individuals bent upon constructing bombs and other dangerous weapons. Publications in this category include:

—*Explosives In Roadworks: User's Guide* (Assoc. of Australian State Road Authorities, 1982);

—*Explosives and Blasting Procedures Manual* (U.S. Bureau of Mines, 1982);

—*Military Chemical and Biological Agents: Chemical and Toxicological Properties* (Telford Press, 1987); and

—*Clearing Land Of Rocks for Agricultural and Other Purposes* (Institute of Makers of Explosives, 1918).

Another collection of some 48 different "underground publications" dealing with bombmaking, contained in the library of the FBI Explosive Unit, reflects a similar di-

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in a Report to Congress will create no additional risk. Nevertheless, except as specifically noted, the mention of any particular source of bombmaking information in this Report should not be taken as validation or acknowledgement of the accuracy or value of that information.

versity of such published material. All of this literature was easily obtainable from commercial sources.

The ready accessibility of such literature is further illustrated by reference to a single page in a recent 70-page catalog of Delta Press, Ltd., of El Dorado, Arizona, captioned "Homemade Explosives." Among the texts featured on that page are *Improvised Shape Charges, Two Component High Explosive Mixtures, Improvised Radio Detonation Techniques,* and the *Anarchists Handbook Series.* Another page, captioned "poisons," advertises *The Poisoner's Handbook,* which it touts as "a complete handbook of poisons, both natural and manmade," including poisonous gases, lethal drugs, poisonous explosive compounds and a "list of sources and some additional chemistry." A number of the titles featured in this publication are commonly featured, along with firearms publications, at local gun shows.

With respect to weapons of mass destruction, there are a number of readily available books, pamphlets, and other printed materials that purport to provide information relating to the manufacture, design and fabrication of nuclear devices. The Department is aware of many publications that claim to provide some fundamentals necessary for the understanding of nuclear weapons, *e.g.*, physics, design, manufacture, or fabrication. They include:

—*The Curve of Binding Energy* (J. McPhee, 1974);

—*U.S. Nuclear Weapons: The Secret History* (C. Hansen, 1996); and

—*The Swords of Armageddon* (C. Hansen, 1986).[3]

Stories of crimes contained in popular literature and magazines also constitute a rich source of bombmaking information. For example, the August 1993 edition of

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[3] *See also infra* note 54 (discussing publication by various periodicals, including the Progressive, of articles describing technical processes of thermonuclear weapons).

Reader's Digest contains an account of efforts by law enforcement officers to track down the killer of United States Court of Appeals Judge Robert S. Vance and attorney Robert Robinson. That article contained a detailed description of the explosive devices used by the bomber in committing the murders, including such information as the size of the pipe bombs, how the bombs were constructed, and what type of smokeless powder was used in their construction.[4] According to the Arson and Explosives Division of the Bureau of Alcohol, Tobacco and Firearms, in a bombing case originating in Topeka, Kansas, the devices were patterned after the bomb used to kill Judge Vance. Upon questioning, the suspect admitted to investigators that he constructed the bomb based on information contained in the *Reader's Digest* article.

B. *The Internet.* Bombmaking information is literally at the fingertips of anyone with access to a home computer equipped with a modem.[5] To demonstrate such availability, a member of the DOJ Committee accessed a single website on the World Wide Web and obtained the titles to over 110 different bombmaking texts, including "Calcium Carbide Bomb," "Jug Bomb," "How To Make a CO2 Bomb," "Cherry Bomb," "Mail Grenade," and "Chemical Fire Bottle." The user could access and print the text of each of the listed titles.[6]

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[4] *See* "Hunt for a Mad Bomber," *Reader's Digest*, 77, 79 (August 1993).

[5] Much of the information available in print pertaining to nuclear weapons also can be found on the Internet. A number of websites, for example, have included compilations of nuclear weapons information gleaned from literature elsewhere in the public domain.

[6] The list, captioned "Bombs: All About Things that Go Boom," includes a warning that the compiler does "not endorse, nor check for the safety, or validity of these bomb making procedures. Makers of these devices take all responsibility. . . . [A]ll of these devices do or can pose a risk to the creators and other individuals." The compiler further suggests that "[f]or [the reader's] safety please

One of the texts, captioned "Nifty Things That Go Boom," appears to be a computer adaptation of *The Terrorist's Handbook* (purportedly edited at Michigan State University). The publication contains chapters that describe and address the procurement (legal and otherwise) of necessary explosives, chemicals and other ingredients, the preparation of chemicals, techniques for transforming such substances into bombs and explosives, and the manufacture of fuses and other ignition systems.

Another of the accessed texts purports to consist of the "Bomb Excerpts" from *Anarchy Cookbook*. This text explains in minute detail how to construct dozens of different types of bombs and explosive devices, including fertilizer bombs, dynamite and other explosives made with chemicals and other substances that "can be bought at Kmart, and various hardware supply shops." The text also details the ways that such devices can be employed following their fabrication. For example, discussing the use of a bomb constructed from a CO2 cartridge and black powder, it explains:

> Insert a fuse. . . . Now, light it and run like hell!
> It does wonders for a row of mailboxes (like the ones in apartment complexes), a car (place under the gas tank), a picture window (place on window sill), a phone booth (place right under the phone), or any other devious place. This thing throws shrapnel, and can make quite a mess!

Similarly, after explaining how to build a thermite bomb, the manual explains:

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read the recipes carefully two and three times over before attempting."

It is important to note that, even if a user of the World Wide Web does not know the specific location of a website containing bombmaking information, such data can easily be located with a search engine.

> Now when you see your victim's car, pour a fifty-cent sized pile onto his hood, stick the [magnesium] ribbon in it, and light it with a blow torch. Now chuckle as you watch it burn through the hood, the block, and axle, and the pavement. BE CAREFUL! The ideal mixtures can vaporize CARBON STEEL! Another idea is to use thermite to get into pay phone and cash boxes. HAVE FUN!

And in discussing how to construct a thermite letter bomb using an insulated, padded mailing envelope, the author explains that, when the detonating "explosive is torn or even squeezed hard it will ignite the powdered magnesium . . . and then it will burn the mild thermite. If the thermite didn't blow up, it would at least burn the fuck out of your enemy (it does wonders on human flesh!)."[7]

Our review of material accessible on the Internet also reveals the frequent use of "Usenet" newsgroups to facilitate the exchange of information concerning the fabrication and use of explosives and other dangerous weapons. For example, on August 28, 1996, one participant of a Usenet newsgroup inquired whether anyone had a recipe for C-4 and detonation techniques. The following day,

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[7] In a colloquy during the Senate's consideration of the Feinstein Amendment, *see supra* at 3-4, Senators Biden and Feinstein described similar material that members of their staffs had obtained over the Internet. Senator Biden referred to one item that instructed readers how to manufacture a "baby food bomb" from shotgun shells and "other materials that can be obtained by anyone" that are so "powerful that they can destroy a car." 142 Cong. Rec. S3448 (daily ed. Apr. 17, 1996) (statement of Sen. Biden). Senator Feinstein observed that *The Terrorist's Handbook* is available by mail order and on the Internet. She observed that this book begins by stating that "[w]hether you are planning to blow up the World Trade Center, or merely explode a few small devices on the White House lawn, the 'Terrorist's Handbook' is an invaluable guide to having a good time." It then goes on to explain, among other things, how to steal the chemicals necessary for making an explosive from a college laboratory. 142 Cong. Rec. S7272 (daily ed. June 28, 1996) (statement of Sen. Feinstein).

someone responded to the inquiry by posting a detailed formula, explaining that "[t]he production of C-4 is probably beyond what can [be] done in the kitchen, but here is something to get you started." On August 16, 1996, another Usenet participant complained that he had "recently attempted to follow the recipe [for an explosive] posted earlier . . . and nearly blew my arms off!" This prompted the following response:

> So what do you want, sympathy? Let me clue you in here. Actually building any of this stuff is illegal, immoral, anti-social, and just plain wrong. But then, so are a lot of other fun things. The point is, if you do it, and you blow yourself up, it's your own fault. So quit sniveling. [N]ext time, don't cook at home.

C. *Summary*. It is readily apparent from our cursory examination that anyone interested in manufacturing a bomb, dangerous weapon or weapon of mass destruction can easily obtain detailed instructions for fabricating and using such a device. Available sources include not only publications from the so-called underground press but also manuals written for legitimate purposes, such as military, agricultural, industrial and engineering purposes. Such information is also readily available to anyone with access to a home computer equipped with a modem.

II. THE EXTENT TO WHICH PUBLISHED BOMB-MAKING INFORMATION HAS FACILITATED THE MANUFACTURE AND USE OF EXPLOSIVES IN ACTS OF TERRORISM AND OTHER CRIMINAL ACTIVITY

Recent law enforcement experience demonstrates that persons who attempt or plan acts of terrorism often possess literature that describes the construction of explosive devices and other weapons of mass destruction (including biological weapons). Although in some cases there is no hard evidence demonstrating that such individuals ac-

tually employed such information in furtherance of their crimes, possession of such information often is strong circumstantial evidence from which such usage can be inferred.

During the execution of a search warrant at the Rex, Georgia residence of Walter Leroy Moody, Jr., the convicted bombing murderer of Judge Robert S. Vance and attorney Robert Robinson, investigators discovered a copy of the *Anarchist's Cookbook*.

In November 1995, Oklahoma residents Ray and Cecilia Lampley, along with one John "J.D." Baird, began construction of an ammonium nitrate bomb, utilizing a manual for the making of "Homemade C-4," a military plastic explosive. The group intended to destroy either the Jewish Anti-Defamation League building in Houston, Texas, or the Southern Poverty Law Center in Birmingham, Alabama. Following the recipe from the manual, the Lampleys "cooked" the ammonium nitrate, and obtained accelerants, such as nitromethane and powdered aluminum. Additionally, Ray Lampley learned that he needed an initial detonating charge to properly detonate the "homemade C-4," and attempted to make a triacetone triperoxide detonator utilizing instructions from *Ragnar's Big Book of Explosives*. When the three co-conspirators were arrested by the FBI, law enforcement agents recovered the *Anarchist's Cookbook* and *Homemade Weapons*, in addition to the "homemade C-4" text, from the Lampley residence.[8]

Following the February 26, 1993, terrorist bombing of the World Trade Center in New York City, investigators discovered bombmaking manuals in the possession of individuals connected with that crime. Although it is believed that those individuals brought those particular

[8] All three defendants were convicted by jury on April 24, 1996, on charges that included conspiracy to make a destructive device to be used to destroy a building used in interstate commerce.

manuals into the United States from a foreign country, the manuals had been copied from books written and printed in the United States and available for purchase from publishers like Paladin Press. The presence of these manuals suggests that the conspirators consulted them in effecting their deadly terrorist scheme.

Between January 1994 and January 1996, a string of some 18 bank robberies occurred across the Midwest. The robberies were committed by individuals brandishing automatic weapons, wearing disguises, and using hoax-bomb devices, apparently to delay pursuit and investigation. Following the arrests of two individuals linked to the series of robberies, investigators conducted searches of safehouses and other locations used by the defendants. Execution of the search warrants resulted in the discovery of numerous weapons, explosives, grenades, and components for manufacturing improvised explosive devices. Additionally, the investigators discovered a library of literature describing neo-guerrilla techniques, including the manufacture and use of explosives.

Beginning in 1991, four members of the "Patriots Council," a Minnesota tax protest group, began to develop a castor-bean derivative known as "ricin," which is one of the most toxic known substances. The members involved learned the process of manufacturing ricin from a mail-order pamphlet. The group planned to suspend the substance in a toxic gel capable of transmission through a skin barrier, and then to place impregnated gel on doorknobs, handles, and steering wheels. They were considering whether to target IRS agents, U.S. Marshals, or local sheriffs for ricin attacks when the FBI arrested them.[9]

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[9] In 1995, all four members were subsequently tried, convicted and sentenced for violating 18 U.S.C. § 175 (unlawful possession of biological weapons). Although the Patriot Council members only

In 1993, Thomas Lavy attempted to cross the Canadian border carrying 130 grams of ricin—an amount that, if administered in individual doses, would be sufficient to kill over 32,000 people—as well as four guns and $89,000 in cash. Canadian officials returned Lavy to the United States because of the amount of cash he was carrying. A search of Lavy's cabin by law enforcement officers revealed that he possessed mail-order books, such as *The Poisoner's Handbook*, *Silent Death*, and *Get Even: The Complete Book of Dirty Tricks*, which, among other things, describe how to make and use ricin. Lavy committed suicide before he could be tried.

To the Department's knowledge, no devices producing a nuclear yield have been constructed based on published bombmaking information. However, the Department is aware of approximately 117 threats since 1970 involving detonations of nuclear devices. Approximately half of these nuclear extortion threats have been accompanied by sketches, information, or descriptive phrases gleaned from information in the public domain, including technical reference materials and fictional nuclear "thrillers."

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possessed 0.7 grams of ricin, this minute amount constitutes more than 100 lethal doses.

We note that, on November 1, 1995, a senior official of the FBI, testifying before the Senate Permanent Subcommittee on Investigations, apprised the Subcommittee members of the ricin plot, including the use by the conspirators of a publicly available instruction manual describing manufacture of the toxic poison. *See* Statement of John P. O'Neill, Chief, Counterterrorism Section, FBI, in *Global Proliferation of Weapons of Mass Destruction: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 104th Cong., 1st Sess. 236 (1995). Another senior FBI official furnished identical information to the House Subcommittee on Military Research and Development. *See* Statement of Robert M. Blitzer, Chief, Domestic Terrorism/Planning Section, FBI, in *Chemical-Biological Defense Program and Response to Urban Terrorism: Hearings Before the Subcomm. on Military Research and Development of the House Comm. on National Security*, published at 1996 WL 7136609 (Mar. 12, 1996).

In addition to the incidents recounted above, reported federal cases involving murder, bombing, arson, and related crimes, reflect the use of bombmaking manuals by defendants and the frequent seizure of such texts during the criminal investigation of such activities. *See, e.g., United States v. Prevatte,* 66 F.3d 840, 841 (7th Cir. 1995) (bombmaker read *Anarchist's Cookbook*); *United States v. Johnson,* 9 F.3d 506, 510 (6th Cir. 1993) (search of bombmaker's residence revealed presence of books on explosive devices), *cert. denied,* 512 U.S. 1212 (1994); *United States v. Talbot,* 902 F.2d 1129, 1131 (4th Cir. 1990) (execution of search warrant at residence of bombmaker revealed presence of books on bombmaking); *United States v. Michael,* 894 F.2d 1457, 1459 (5th Cir. 1990) (bombmaker bought books at gun shows to determine how to make bombs, booby traps and silencers); *United States v. Levasseur,* 816 F.2d 37, 41 (2d Cir. 1987) (execution of search warrant at bomber's residence revealed presence of bombmaking instructions); *United States v. Arocena,* 778 F.2d 943, 947 (2d Cir. 1985) (members of "Omega 7" group, who conducted terrorist bombings in New York metropolitan area, possessed bombmaking manuals), *cert. denied,* 475 U.S. 1053 (1986); *United States v. Williams,* 775 F.2d 1295, 1298 (5th Cir. 1985) (bomb murderer used Marine Corps training manual to construct "mouse trap" bomb), *cert. denied,* 475 U.S. 1089 (1986); *United States v. Bergner,* 800 F. Supp. 659, 663 (N.D. Ind. 1992) (bomber consulted *Anarchists's Cookbook* and other bombmaking texts available at police academy library).

Finally, information furnished by the Bureau of Alcohol, Tobacco and Firearms reveals that such literature is frequently used by individuals bent upon making bombs for criminal purposes. ATF statistics reflect that, between 1985 and June 1996, the investigations of at least 30 bombings and four attempted bombings resulted in the recovery of bombmaking literature that the suspects had

obtained from the Internet. Most recently, on August 6, 1996, ATF investigators participated in the investigation of two North Attleboro, Massachusetts, juveniles, aged 11 and 14, who were injured while attempting to make an improvised explosive device. The youths had retrieved from Internet information on how to make napalm, and were badly burned when a mixture being heated on a kitchen stove ignited.[10]

In sum, it is fair to conclude from scenarios such as those we have described that the availability of bombmaking literature may play a significant role in aiding those intent on using explosives and other weapons of mass destruction for criminal purposes, including acts of terrorism. Moreover, the availability of this information might contribute to youthful experimentation with explosive devices, which could result in serious injury.

III. THE LIKELIHOOD THAT PUBLISHED BOMBMAKING INFORMATION WILL CONTINUE TO BE USED TO FACILITATE ACTS OF TERRORISM AND OTHER CRIMINAL ACTIVITY

It is, of course, impossible to prognosticate with any measure of certainty the extent to which persons wishing to engage in acts of terrorism and other criminal activity will rely upon printed and computer-based information instructing them how to manufacture bombs, other dangerous weapons, and weapons of mass destruction. A statistical survey conducted by the FBI concerning bombing incidents occurring in the United States shows that between 1984 and 1994, the frequency of such incidents has increased almost four-fold. The study, however, did not attempt to correlate the trend with the increased availability of bombmaking information. Therefore, we have

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[10] *See also* Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Arson and Explosives—Incidents Report 1994*, at 41-51 (1995).

no empirical data on what percentage, if any, of the recent increase in the number of bombings is attributable to the increased availability of bombmaking information. However, based upon the recent experiences recounted above, both the FBI and ATF expect that because the availability of such information is becoming increasingly widespread, such bombmaking instructions will continue to play a significant role in aiding those intent upon committing future acts of terrorism and violence.

IV. APPLICABILITY OF CURRENT FEDERAL LAW TO THE PUBLICATION AND DISSEMINATION OF BOMBMAKING INFORMATION

Presently there are four basic ways in which dissemination of bombmaking information could be punished under federal criminal law, depending on the circumstances of the case.[11] The first three bases for culpability—federal statutes prohibiting (i) conspiracy, (ii) solicitation, and (iii) aiding and abetting—do not single out information concerning bombmaking for special treatment. The fourth basis for culpability—18 U.S.C. § 231—is directed specifically at the "teaching or demonstrating" of techniques related to the use or manufacture of firearms and explosives.[12]

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[11] This Report deals almost exclusively with the ability of the government to prohibit or restrict the dissemination by private persons of bombmaking information that has not been classified. The Report does not discuss in any detail the separate, broader authority of the government to impose "reasonable restrictions" on its own employees' activities to ensure that those employees do not disclose classified information belonging to the government itself. *See generally Snepp v. United States*, 444 U.S. 507 (1980).

[12] With respect to information concerning atomic weapons in particular, there is another restriction in federal law that also should be mentioned. The Atomic Energy Act imposes certain restrictions on the dissemination of "Restricted Data," which is defined to include, *inter alia*, "all data concerning design, manufacture, or utilization of atomic weapons," 42 U.S.C. § 2014(y)(1), unless such

A. *Conspiracy.* A conspiracy to use an explosive to commit "any felony which may be prosecuted in a court

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information has been expressly "declassified or removed from the Restricted Data category," *id.* In particular, it is unlawful to communicate, transmit or disclose such "Restricted Data" to any person either (i) with intent to injure the United States or with intent to secure an advantage to any foreign nation, 42 U.S.C. § 2274(a), or (ii) with "reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation," *id.* § 2274(b). In addition, the Attorney General may apply to a court for an injunction prohibiting impermissible dissemination of such Restricted Data by persons who are "about to engage" in such conduct. 42 U.S.C. § 2280.

Insofar as Restricted Data includes simply information produced by or for the government—such as the government's self-generated, classified information—the extent to which the government may prohibit dissemination of such data by those who are granted access to it is a matter outside the principal scope of this Report. *See supra* note 11; *infra* note 44. However, there is a serious question whether Restricted Data also includes information developed or compiled by private citizens who have not had access to classified government documents. *See generally* Mary M. Cheh, *The* Progressive *Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls*, 48 Geo. Wash. L. Rev. 163, 180-88 (1980). The position of the Department of Energy is that such "privately generated" information concerning nuclear weapon design can be Restricted Data subject to the statutory restrictions on dissemination, *see* 62 Fed. Reg. 2252, 2254, 2261 (Jan. 15, 1997) (proposing new 10 C.F.R. § 1045.21, which would make this point explicitly); and the only court to opine on the matter has confirmed this statutory construction, *see United States v. Progressive, Inc.*, 467 F. Supp. 990, 998-1000 (W.D. Wis.), *rehearing denied*, 486 F. Supp. 5 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). Insofar as the Restricted Data provisions do encompass certain privately generated information concerning nuclear weapons, *see* 62 Fed. Reg. at 2253-54 (discussing the types of information that the Department of Energy presently considers Restricted Data), the Atomic Energy Act would provide another statutory means of limiting the dissemination of such forms of bombmaking information. However, because Senator Feinstein's initiative in the last Congress was not directed specifically to information about such nuclear weapons, we will limit our discussion of Restricted Data to this footnote, except to note the following: As discussed

of the United States," 18 U.S.C. § 844(h), is explicitly proscribed under 18 U.S.C. § 844(m); and a conspiracy to commit any offense defined in Chapter 40 of Title 18, U.S. Code—entitled "Importation, Manufacture, Distribution, and Storage of Explosive Materials"—is prohibited by 18 U.S.C. § 844(n). In addition, the general federal criminal conspiracy statute, 18 U.S.C. § 371—which prohibits conspiring "to commit any offense against the United States"—makes it unlawful to conspire to commit other federal crimes involving explosives. A person may not, as part of a conspiracy to commit an independently defined criminal offense, transmit information to a coconspirator concerning how to make or use explosive devices.[13] Indeed, such transmission of information could be an overt act in support of a conspiracy.[14]

In order to prove that a person disseminating bomb-making information did so as part of a conspiracy to commit a substantive offense, the government need not prove that the substantive offense occurred; however, the government must show, at the very least, that the disseminator (i) knew of the intended unlawful use of the

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infra at 30-34 & note 54, any attempt by the government to restrict or punish the dissemination of Restricted Data that was *already in the public domain* would run up against significant First Amendment constraints, absent an intent by the disseminator to injure the United States or to secure an advantage to any foreign nation.

[13] *Cf., e.g., United States v. Rowle*, 899 F.2d 1275, 1278 (2d Cir.) (defendant properly convicted of conspiracy to defraud United States based on having provided instruction and assistance to others in avoiding income tax liability), *cert. denied*, 498 U.S. 828 (1990); *United States v. Daly*, 756 F.2d 1076, 1081-82 (5th Cir. 1985) (defendant properly convicted of conspiracy to defraud United States based on having disseminated information to members of church on how to file tax returns so as to hamper IRS investigation).

[14] *See, e.g., United States v. Donner*, 497 F.2d 184, 192 (7th Cir. 1972) (speech, including otherwise constitutionally protected speech, can constitute overt act in furtherance of conspiracy), *cert. denied*, 419 U.S. 1047 (1974).

information and (ii) agreed with other conspirators that an offense would be committed.[15] And, as a general matter, the requisite agreement cannot be proved simply by demonstrating that a person has provided a product to another person knowing that the product would be used in the commission of a crime, where the provider of the product is indifferent to its subsequent use.[16] [A] conspiracy requires agreement, and there is a difference between knowing that something will occur [by virtue of one's sale of product]—even as an absolute certainty—and agreeing to bring that same 'something' about. *United States v. Lechuga*, 994 F.2d 346, 362 (7th Cir.) (Cudahy, J., concurring in pertinent part), *cert. denied*, 510 U.S. 982 (1993). It follows that "an isolated sale is not the same thing as enlisting in the venture." *United States v. Blankenship*, 970 F.2d 283, 287 (7th Cir. 1992).[17]

B. *Solicitation.* The federal criminal solicitation statute, 18 U.S.C. § 373, provides in pertinent part:

> Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States,

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[15] *See generally Direct Sales Co. v. United States*, 319 U.S. 703 (1943); *United States v. Falcone*, 311 U.S. 205 (1940); *United States v. Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996).

[16] *See Direct Sales; Falcone; United States v. Blankenship*, 970 F.2d 283 (7th Cir. 1992).

[17] *See also Lechuga*, 994 F.2d at 349-50 (opinion for four judges of 11-member *en banc* panel); *id.* at 362-63 (opinion of three other judges, concurring on this point). However, where the commodity in question has an "inherent capacity" to be used unlawfully, and where the provider of the product has a stake in the success of the illegal venture for which that product is used, a regular course of conduct involving such sales may support proof of a conspiracy. *Direct Sales*, 319 U.S. at 711-13.

> and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

Id. § 373(a). Solicitation proscribed by this statute often will take the form of speech, including written speech.[18] Indeed, Congress intended that the statutory phrase "otherwise endeavors to persuade" be construed broadly to cover any situation ' 'where a person seriously seeks to *persuade* another person to engage in criminal conduct.' " *United States v. Buckalew*, 859 F.2d 1052, 1054 (1st Cir. 1988) (Breyer, J.) (quoting S. Rep. No. 307, 97th Cong., 1st Sess. 183-84 (1982)) (emphasis added). In the prototypical solicitation case, the "persuasion" is accompanied by some form of inducement, such as a money payment, or a threat. Such a case raises no First Amendment issues, for reasons we explain *infra* at 35-38.[19] However, insofar as Congress also intended § 373 to cover cases of "persuasion" taking the form of mere advocacy or urging of unlawful action—*without* any threat or inducement—many such cases could be subject to significant First Amendment constraints under the *Brandenburg*

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[18] *See, e.g., United States v. McNeill*, 887 F.2d 448, 450-52 (3d Cir. 1989), *cert. denied*, 493 U.S. 1087 (1990).

[19] Similarly, the First Amendment does not protect an offer to engage in an unlawful transaction or activity. *See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973); *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1116-21 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993); *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397, 1398-1402 (W.D. Ark. 1987).

doctrine. *See infra* at 29-30 (discussing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).[20] Therefore, for purposes of this discussion, we will assume that § 373 would be used principally in the case of "persuasion" accompanied by an inducement (*e.g.*, murder for hire[21]) or an explicit or implicit threat or "command" (*e.g.*, an organized crime boss "asking" an associate to commit a crime).

In such cases, the solicitation itself would not likely be in the form of a transmission of bombmaking information. However, as part of a solicitation scheme, it is conceivable that the solicitor would transmit such information so as to facilitate the crime being solicited. Indeed, such facilitation could provide circumstances that "strongly corroborate" a solicitor's improper intent, thereby satisfying § 373's scienter requirement: Congress indicated that it would be "highly probative" of improper intent if the solicitor "acquired . . . information suited for use by the person solicited in the commission of the offense, or made other apparent preparations for the commission of the offense by the person solicited." S. Rep. No. 307, 97th Cong., 1st Sess. 183 (1982).

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[20] *See District of Columbia v. Garcia*, 335 A.2d 217, 224 (D.C.) (distinguishing between constitutionally protected advocacy and "the act of enticing or importuning on a personal basis for personal benefit or gain"), *cert. denied*, 423 U.S. 894 (1975). *See also People v. Rubin*, 158 Cal. Rptr. 488, 491 (Cal. Ct. App. 1979) (discussing distinction between "general advocacy of crime" and solicitation of crime accompanied by "offer of reward"), *cert. denied*, 449 U.S. 821 (1980). Professor Kent Greenawalt has argued that the *Brandenburg* requirements (such as the requirement of "imminent" criminal conduct) should be relaxed in the case of private, nonideological solicitations to crime, even where there is no inducement or threat, but only persuasion. Kent Greenawalt, *Speech, Crime, and the Uses of Language* 261-65 (1989). While this argument has some force, we are not aware that any court has yet endorsed it.

[21] *See, e.g., United States v. Razo-Leora*, 961 F.2d 1140, 1147 (5th Cir. 1992).

Although § 373 does not require either actual agreement (like conspiracy), nor that the crime be committed (like aiding and abetting), it nonetheless could provide a means of addressing dissemination of bombmaking information in only a limited set of cases. For one thing, the statute requires more than mere dissemination of information: there must be some solicitation, command, inducement or other endeavor to persuade. (And the First Amendment might exclude cases of "persuasion" absent any threat, command or inducement.) More importantly, the government must prove "circumstances strongly corroborative" of the solicitor's intent that another person engage in conduct constituting a felony.

C. *Aiding and Abetting.* Two different "aiding and abetting" statutes might have some application in cases where bombmaking information is disseminated: (i) the general federal aiding and abetting statute, 18 U.S.C. § 2, and (ii) section 323 of the AEDPA, which concerns provision of material support or resources for use in certain crimes of terrorism.

1. *18 U.S.C. § 2.* In 1909 Congress enacted what is now 18 U.S.C. § 2, a general aiding and abetting statute applicable to all federal criminal offenses. That statute in essence provides that "those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing the crime." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) (citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)).[22] Not infrequently, aiding and abetting can take the form of speech, including providing instructions on how to com-

[22] Subsection 2(a) reads: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal." This statute does not create a distinct federal offense; rather, it merely abolishes the common-law distinction between principals and accessories. *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 177-78 (6th Cir. 1992).

mit a crime to a particular person or to a discrete audience.[23] Section 2 nonetheless is somewhat ineffectual as a tool to address dissemination of information on how to manufacture explosives, for three reasons.

First, there is some question whether aiding and abetting culpability ever can rest solely on the basis of general publication of instructions on how to commit a crime, or undifferentiated sale to the public of a product that *some* purchaser is likely to use for unlawful ends, or whether, at a minimum, the person supplying the aid must know that a *particular* recipient thereof will use it in commission of a crime.[24]

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[23] *See, e.g., United States v. Kelley*, 769 F.2d 215, 216-17 (4th Cir. 1985) (defendant aided and abetted tax fraud by instructing others on how to prepare false forms); *United States v. Buttorff*, 572 F.2d 619, 623 (8th Cir.) (same), *cert. denied*, 437 U.S. 906 (1978).

[24] The law is unsettled on the question of how much contact, or "proximity," is required between the principals and the accomplice—that is to say, to what extent the accomplice must "know" who it is he is aiding. In a series of cases similar to those cited *supra* note 23, courts have found that defendants could be held culpable for aiding and abetting tax-code violations merely by virtue of having provided instruction on unlawful tax-fraud techniques to a discrete group of listeners who had indicated a specific interest in violating the law. *See also, e.g., United States v. Rowlee*, 899 F.2d 1275 (2d Cir.), *cert. denied*, 498 U.S. 828 (1990); *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986); *United States v. Daly*, 756 F.2d 1076 (5th Cir. 1985); *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

A harder question is whether aiding and abetting can be established with even less direct connection between the aider and the principals. In *Buttorff*, the court of appeals held that the aiding and abetting "joint participation" test was satisfied by virtue of tax-evasion instructions that defendants had provided at "large public gatherings," presumably to persons whom they did not personally meet. 572 F.2d at 622-23. *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982), suggests that this same theory of aiding and abetting could be applied to written instructions sent by mail to a customer whom the publisher had never met. In that case, the

Second, even assuming that aiding and abetting could under some circumstances be established by virtue of a

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defendant allegedly advertised in a magazine that it was making available for mail-order purchase a catalog of instructions for manufacture of phencyclidine, and sent such instructions—along with the name of a "reliable" chemical supplier—to a person who submitted the required $10 purchase price. *Id.* at 840. In the context of determining whether there was probable cause for a warrant to search the seller's premises, the court held that these allegations were sufficient to allege that the publisher had aided and abetted the recipient's manufacture of phencyclidine. The court reasoned that:

> [I]t is unnecessary for the government to show that Barnett [the seller of the instructions] ever met with Hensley [the buyer] in order to prove that he aided and abetted him in his attempt to manufacture phencyclidine. The facts alleged in the search warrant established that Barnett provided essential information for the specific purpose of assisting Hensley in the commission of a crime.

Id. at 843. (The opinion does not indicate whether the "facts alleged" in the search warrant included more than what is described above.)

By contrast, part of the aiding-and-abetting rationale in *Buttorff* and *Barnett* may have been implicitly questioned in *Superior Growers*. In that case, the Sixth Circuit held that an indictment had not adequately charged conspiracy to aid and abet marijuana possession against proprietors of a garden-supply store. The indictment alleged, *inter alia*, that the defendants "occasionally provided information and advice on how to grow marijuana to various customers"; but there was no allegation that any particular customer in fact used such advice to commit a crime. The court held that the "providing information" allegation "ultimately falls short" of alleging the requisite intent to aid and abet, "because it does not state that the publications or information were given with defendants' knowledge that a particular customer was planning to grow marijuana, and with defendants' intent to assist that customer in the endeavor." 982 F.2d at 178. According to the court, in other words, it was insufficient for the government merely to demonstrate that the proprietors intended to aid and abet their customers; it was essential to prove that the proprietors had knowledge that their customers were manufacturing marijuana "or intended to manufacture marijuana." *Id.* at 175.

publisher's knowledge that unknown recipients of generally published information would use it to commit crimes, § 2 requires that the accomplice have engaged in intentional wrongdoing, rather than mere recklessness. *Central Bank of Denver*, 511 U.S. at 190. That is to say, the aider must not only know that her assistance will be in the service of a crime; she also must share in the criminal intent. The defendant must " 'participate in [the venture] as in something that he wishes to bring about, that he seek by his action to make it succeed.' " *Nye & Nissen*, 336 U.S. at 619 (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)).[25] As Judge Hand explained in the seminal *Peoni* case, the intent standard for criminal aiding and abetting is not the same as the "natural consequences of one's act" test that is the touchstone for "intent" in the civil tort context; criminal intent to aid the crime has "nothing whatever to do with the probability that the forbidden result [will] follow upon the accessory's conduct." *Peoni*, 100 F.2d at 402. Rather, the aider must have a "purposive attitude" toward the commission of the offense. *Id.*[26]

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[25] This standard applies even where the federal crime being assisted involves the unlawful use of explosives. *See, e.g., United States v. Hewitt*, 663 F.2d 1381, 1385 (11th Cir. 1981) (describing elements of aiding and abetting a violation of 18 U.S.C § 844(h)).

[26] Judge Hand's view of the intent required for criminal aiding and abetting was not shared by all courts, some of which argued that it was sufficient that the aider and abettor knew of the purpose of the principal—*i.e.*, that the crime was a natural consequence of the assistance. The classic statement of this position is found in *Backun v. United States*, 112 F.2d 635, 636-37 (4th Cir. 1940). The Supreme Court, in *Nye & Nissen*, nominally resolved the debate by adopting Judge Hand's view. *But see United States v. Ortega*, 44 F.3d 505, 508 (7th Cir. 1995) (defendant could be culpable of aiding and abetting even in the absence of evidence that he wanted the unlawful act to succeed, if defendant "rendered assistance that he believed would (whether or not he cared that it would) make the principal's success more likely"); *United States v. Zafiro*, 945 F.2d 881, 887-88 (7th Cir. 1991) (dicta) (aiding and abetting should be established even absent intent to assist illegal activity, if

Finally, under the plain terms of § 2, the underlying offense must in fact be committed (though the government need not prove by whom it was committed); section 2 merely makes aiders and abettors culpable for their principles' commission of an offense.[27] There is no federal statute generally proscribing an *attempt* to aid and abet a federal offense (though the Model Penal Code recommended that such a prohibition be codified).[28] Therefore, if a crime has not been committed, the general federal aiding and abetting statute cannot be invoked.

2. *AEDPA Section 323.* Section 323 of the AEDPA, 110 Stat. at 1255 (to be codified as amended section 2339A(a) of Title 18) makes it unlawful to provide "material support or resources" to another person, "knowing or intending that they are to be used in preparation for, or in carrying out," various federal offenses relating to terrorism, or in preparation for, or in carrying out, the concealment from the commission of any such violation. *Id.* (to be codified at 18 U.S.C. § 2339A(a)).[29] Notably, the statute defines the term "material support or resources"

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abettor "knowingly provides essential assistance" that cannot readily be obtained from other sources), *aff'd on other grounds*, 506 U.S. 534 (1993).

[27] *See, e.g., Superior Growers*, 982 F.2d at 177-78; *United States v. Campa*, 679 F.2d 1006, 1013 (1st Cir. 1982).

[28] *See United States v. Giovannetti*, 919 F.2d 1223, 1227 (7th Cir. 1990) (citing American Law Institute, Model Penal Code § 2.06(3)(a)(ii)). Although attempted aiding and abetting is not a crime, the converse is not true: it is unlawful to aid and abet an attempted crime, provided the underlying attempt is itself an unlawful act.

[29] The substantive crimes that may not be "support[ed]" under section 323 are: 18 U.S.C. §§ 32, 37, 81, 175, 351, 831, 842(m) and (n), 844(f) and (i), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, and 2340A, and 49 U.S.C. § 46502.

to include, *inter alia*, "training, . . . and other physical assets." *Id.* (to be codified at 18 U.S.C. § 2339A(b)).[30]

Section 323 essentially is a prohibition on certain forms of knowing or intentional facilitation of particular terrorist crimes. In two respects, it is broader in scope than the general aiding and abetting statute. First, the facilitator can be culpable even if the underlying offense is not in fact committed. Second, the scienter provision is a bit broader than the "intent" requirement in 18 U.S.C. § 2. Under AEDPA section 323, specific intent to facilitate the underlying offense is not necessary:[31] the person providing the support or resources can be culpable so long as he "*know*[*s*]" that the resources provided "are to be used" to prepare for or commit a specified offense. In effect, however, this "knowledge" provision will rarely be of use to a prosecutor, because where—as in section 323—the element of "knowledge" refers to a possible *future* result of a defendant's conduct, typically the government must prove that the defendant was "aware" that that result is *practically certain* to follow from his conduct.' " *United States v. Bailey*, 444 U.S. 394, 404 (1980) (emphasis added) (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978) (internal citation omitted)).[32]

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[30] The full definition of "material support or resources" is: "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." *Id.*

[31] *See* H.R. Conf. Rep. No. 482, 103d Cong., 2d Sess. 232 (1994) (noting that, under the original version of 18 U.S.C. § 2339A, it would not be necessary to prove that the facilitator had a "specific intent to commit the underlying action").

[32] *Accord* Model Penal Code § 2.02(2)(b)(ii) (Official Draft and Revised Comments, 1985); *id.*, Explanatory Note on § 2.02, at 236-37 n.13; *United States v. Meling*, 47 F.3d 1546, 1558 (9th Cir.), *cert. denied*, 116 S. Ct. 130 (1995); *United States v. Powell*, 929

Furthermore, whatever the scope of the "knowledge" provision, the use of section 323 to address distribution of bombmaking information might nonetheless be limited, for two other reasons. First, section 323 covers facilitation of only certain enumerated crimes. *See supra* note 29. Second, it is not clear whether courts would find that information on how to manufacture or use explosives is "material support or resources." In the case of an actual physical demonstration of the techniques in question, or a one-to-one sale of printed information to someone who purports to be planning a crime, transfer of such information might constitute "training." Otherwise, it is open to question whether a manual on explosives would constitute a "physical asset[]" under § 2339A.[33]

D. *18 U.S.C. §231(a)(1).* For the most part, the federal statutes discussed in the previous sections are not directed at dissemination of information, as such. Instead, they are general prohibitions on conduct that can, in particular cases, be violated by providing information to another person.

By contrast, 18 U.S.C. § 231(a)(1)—like the proposed Feinstein Amendment—arguably could be characterized as a prohibition on certain forms of speech. Section 231(a)(1) provides that:

F.2d 724, 726, 728 (D.C. Cir. 1991). The government need not prove that the defendant had this level of knowledge with respect to all of the particular details of the future result, such as the identity of those who are harmed. *Meling*, 47 F.3d at 1558. Thus, under section 323, for example, if a defendant was virtually certain that particular recipients would in fact use the provided resources to commit a terrorist crime, it would be immaterial whether the defendant knew precisely when or where the criminal conduct would occur.

[33] Insofar as it can be argued that Congress intended that "training" be considered a "physical asset" for purposes of the statute, a strong argument could be made that a book containing the substance of such "training" also should be considered a "physical asset." But it is unclear whether a court would adopt this reasoning with respect to a book containing information otherwise readily available in the public domain.

> Whoever teaches or demonstrates to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function . . . [s]hall be fined under this title or imprisoned not more than five years, or both.

"Civil disorder," in turn, is defined as "any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual." 18 U.S.C. § 232(1).

This prohibition applies, not to all forms of speech that could cause a civil disorder, but solely to a discrete type of *conduct* involving expression—namely, the "teach-[ing]" or "demonstrat[ion]" of the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons.[34]

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[34] It is notable that Congress did not prohibit *all* knowing or intentional facilitation of civil disorders—it focused principally on such facilitation accomplished by way of teaching or demonstration. Teaching was not Congresss' sole focus, however: Subsection 231(a)(2) makes it unlawful to "transport[] or manufacture[] for transportation in commerce any firearm, or explosive or incendiary device, knowing or having reason to know or intending that the same will be used unlawfully in furtherance of a civil disorder." It appears that Congress simply addressed those forms of facilitation—teaching (§ 231(a)(1)) and the transport of weapons (§ 231(a)(2))—that were the most apparent threats to civil order not already addressed adequately by accomplice and conspiracy prohibitions.

It appears that this statute has been used sparingly; there are only two reported decisions involving it.[35] In those two cases, the courts of appeals narrowly construed the scienter provisions of § 231(a)(1) so as to avoid serious constitutional questions. *National Mobilization Comm. to End the War in Viet Nam v. Foran*, 411 F.2d 934 (7th Cir. 1969); *United States v. Featherston*, 461 F.2d 1119 (5th Cir.), *cert. denied*, 409 U.S. 991 (1972). In both cases, the persons charged under § 231(a)(1) were alleged to have instructed discrete groups of students on techniques of violence, with the *intent* that such techniques would be used in futherance of civil disorders. The defendants nonetheless complained that the statute was impermissibly vague or overbroad, because its plain terms are not limited to cases of bad intent. Read literally, § 231(a)(1) also could be construed to prohibit *well*-intentioned persons from teaching techniques of self-defense and sporting activities where such persons have a "reason to know" that some pupils might put the skills they acquire to unlawful use. The defendants in *Foran* and *Featherston* argued that this apparent reach of § 231 (a)(1) rendered the statute facially invalid under the First Amendment.

In order to avoid the substantial constitutional questions raised by the "reason to know" language, both courts of appeals construed the scienter element of § 231(a)(1) narrowly. The Seventh Circuit, somewhat cryptically, concluded that "[t]he requirement of *intent* of course 'nar-

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[35] In addition, the United States Attorney for the District of Arizona recently brought an indictment under § 231(a)(1) against six members of the "Viper" Militia who allegedly had been engaged in, or had conspired to engage in, substantial and detailed training of others in the means by which explosives could be used in civil disorders. *United States v. Nelson, et al.*, Cr-96-280-PHX-EHC (D. Ariz.). In December 1996, all six defendants admitted their guilt. Three defendants pled guilty to a substantive violation of § 231(a)(1), and three others pled guilty to conspiracy to violate § 231(a)(1).

rows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription." *Foran*, 411 F.2d at 937 (citation omitted). The Fifth Circuit, relying upon the Supreme Court's narrowing construction of similar language in an espionage statute, held that proof of "'bad faith'" is required under § 231(a)(1). *Featherston*, 461 F.2d at 1121 (quoting *Gorin v. United States*, 312 U.S. 19, 27-28 (1941)). The court concluded that "the statute does not cover mere inadvertent conduct. It requires those prosecuted to have acted with *intent or knowledge* that the information disseminated would be used in furtherance of a civil disorder." *Id.* at 1122 (emphasis added).

The potential use of § 231(a)(1) to reach cases involving dissemination of bombmaking information is limited in three ways. First, as constructed in *Featherston* and *Foran*, § 231(a)(1) can apply only where the person doing the teaching or demonstrating either (i) intends that the information will be used in furtherance of a civil disorder or (ii) "knows" that the information will be so used. As explained *supra* at 21, as a practical matter the "or knows" prong will rarely be useful: since the knowledge in question is of a possible future result of a defendant's conduct, the government must prove that the defendant was "aware 'that the result is *practically certain* to follow from his conduct.'" *Bailey*, 444 U.S. at 404 (citations omitted) (emphasis added).[36] Accordingly, the vast majority of cases in which § 231(a)(1) could successfully be invoked will involve defendants who *intend* that their teaching be used to facilitate or assist in a civil disorder.

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[36] Although this is a demanding standard, nonetheless a person teaching the use of explosives cannot avoid culpability by deliberately ignoring facts that would lead him to be aware that the recipient of the teaching is "practically certain" to use it in furtherance of a civil disorder. *See generally* 1 E. Devitt, C. Blackmar, M. Wolff & K. O'Malley, *Federal Jury Practice and Instructions* § 17.09 (4th ed. 1992).

Second, it is questionable whether the operative verbs—"teaches or demonstrates"—could be read to cover an arms-length sale of a manual to an anonymous or unknown customer. Finally, the intended or known use of the information conveyed must be "in, or in furtherance of, a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function." And a "civil disorder" requires a public disturbance involving violence by assemblages of three or more persons. Section 231(a)(1) would not, therefore, apply to uses of the information by merely one or two felons.

V. THE NEED FOR ADDITIONAL LAWS RELATING TO THE DISSEMINATION OF BOMBMAKING INFORMATION

During the Senate debate on the Feinstein Amendment, Senators Feinstein and Biden identified two sets of circumstances in which the dissemination of bombmaking information ideally should be prohibited:

> (ii) where the person disseminating the information *intends* that it be used for unlawful ends; [37] and
>
> (i) where the person disseminating the information has good reason to know that a *particular* potential recipient thereof plans to use that information to engage in unlawful activities.[38]

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[37] *See, e.g.*, 141 Cong. Rec. S7685 (daily ed. June 5, 1995) (statement of Sen. Feinstein); 142 Cong. Rec. S7273 (daily ed. June 28, 1996) (statement of Sen. Feinstein). *See also*, 141 Cong. Rec. S7684-85 (daily ed. June 5, 1996) (statement of Sen. Hatch) (agreeing to inclusion of "intent" requirement in Feinstein Amendment).

[38] *See, e.g.*, 141 Cong. Rec. S7685 (daily ed. June 5, 1995) (statement of Sen. Biden) (describing situation where information is sent to a particular person who has expressly indicated that he desires such information so that he can make unlawful use of it);

On the other hand, Senator Feinstein made it plain that she did not wish to prohibit the "legitimate" publication of information about explosives contained in, for instance, the Encylopedia Britannica (despite the fact that such information certainly could be used by persons who wished to commit violent crimes);[39] and Senator Hatch indicated that any prohibition that is enacted should be drafted carefully, so as not to subject to criminal sanctions, for example, legitimate explosives manufacturers who teach customers and other persons how to manufacture, and make legitimate use of, explosives.[40]

The Department of Justice agrees that it would be salutary if the federal criminal law prohibited dissemination of bombmaking information in the two circumstances described above, while still permitting the "legitimate" publication of information about explosives in the manner described by Senators Feinstein and Hatch. As the discussion in Part IV demonstrates, however, the present federal criminal code is less than completely effective in accomplishing these objectives:

1. Federal law would in certain cases prohibit or punish the dissemination of bombmaking information

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142 Cong. Rec. S3449 (daily ed. Apr. 17, 1996) (statement of Sen. Biden) (same); 142 Cong. Rec. S7274 (daily ed. June 28, 1996 (statement of Sen. Biden) (same).

[39] 141 Cong. Rec. S7683 (daily ed. June 5, 1995) (statement of Sen. Feinstein).

[40] *Id. at* S7684-85 (statement of Sen. Hatch); *see also id.* at S7685 (statement of Sen. Biden) (agreeing with Senator Hatch that explosives manufacturers should not be subject to culpability simply because there is a chance that some persons who receive information from the manufacturers might use that information for unlawful purposes). Senator Hatch apparently was concerned about whether the statute would deter manufacturers from providing lessons on the manufacture and *use* of explosives. But it should be noted that the Feinstein Amendment would only have restricted the dissemination of information concerning the "making" or "manufacture" of explosive materials, and not the use of such materials.

where the person disseminating the information *intends* that it be used for unlawful ends. For example:

> —If the disseminator enters into an agreement with another person to commit a federal crime, dissemination of bombmaking information as a means of furthering that crime would be an overt act in furtherance of a conspiracy. Similarly, if the disseminator solicits another person to commit a federal crime of violence—for example, by offering a reward for its commission—conveyance of the bombmaking information would be evidence "strongly corroborating" an improper intent, thereby satisfying the scienter requirement of 18 U.S.C. § 373.
>
> —If the disseminator provides the information to a particular person with the specific purpose of assisting the recipient in the commission of a federal crime, and if the recipient thereafter *does* commit such an offense, the disseminator would be culpable for aiding and abetting that offense. And, even if the offense is *not* in fact committed, the disseminator might still be culpable for a violation of AEDPA section 323, provided (i) that the offense that he intended to advance was one of those enumerated in the statute; and (ii) a court finds that bombmaking information can be considered "material support or resources."
>
> —If the disseminator provides the information to a person or persons in order to prepare for or further a "civil disorder," he will have violated 18 U.S.C. § 231(a)(1), assuming that provision of such information constitutes the "teach[ing] or demonstrat[ion] of the making of explosives or incendiary devices.

However, except where the particular requirements of AEDPA section 323 or 18 U.S.C. § 231(a)(1) are met, federal law presently does not provide a ground for prosecution where a disseminator of bombmaking information does not conspire with or solicit another to commit a

federal crime, but nevertheless intends to aid the recipients of the information in commission of such criminal conduct, and where no federal crime is in fact committed. Further, federal law does not presently reach the person who disseminates bombmaking information intending that it be used to aid the commission of a state or local criminal offense, notwithstanding the utilization of interstate or foreign commerce to achieve such dissemination and notwithstanding the actual or potential impact of the underlying violation on such commerce.

2. If a disseminator of bombmaking information does not have the specific purpose of facilitating a crime, but nonetheless is aware that (i) an enumerated terrorist crime or (ii) a "civil disorder" were *practically certain* to follow from dissemination of the information to a particular person or persons, then the disseminator might be culpable under AEDPA section 323, or 18 U.S.C. § 231(a)(1), respectively. However, absent such a high degree of "knowledge" of the facilitation of future crimes, current federal law generally would not prohibit or punish the dissemination of bombmaking information in the case where the disseminator does not have the specifice purpose of facilitating a crime but nevertheless knows that a particular recipient thereof *intends* to use it for unlawful ends.

In sum, current federal law does not specifically address certain classes of cases that Senators Feinstein and Biden identified. Accordingly, the Department of Justice agrees with those Senators that it would be appropriate and beneficial to adopt further legislation to address this problem directly, in a manner that does not impermissibly restrict the wholly legitimate publication and teaching of such information, or otherwise violate the First Amendment.

VI. CONSTITUTIONALITY OF RESTRICTING OR PENALIZING THE PUBLICATION OR DISSEMINATION OF BOMBMAKING INFORMATION

Before identifying what further steps Congress can take to address this problem, it is necessary to discuss whether and to what extent the First Amendment limits the government's power to impose criminal culpability on persons publishing or disseminating bombmaking information. In this regard, it should be noted that in *Rice v. Paladin Enterprises, Inc.*, 940 F. Supp. 836 (D. Md. 1996), *appeal docketed*, No. 96-2412 (4th Cir.), a district court recently held that the First Amendment substantially protects the right of persons to publish such information, regardless of the publishers' intent.

The defendant in that case, publisher Paladin Enterprises, Inc., has (for many years) offered for public sale (principally through a mail-order catalogue) a book entitled *Hit Man*, which describes in great detail specific methods and techniques of, and strategies for, murder for hire. James Perry ordered and received *Hit Man* from Paladin. Thereafter, Perry followed a number of instructions in *Hit Man* in planning, executing, and attempting to hide the evidence of, his contract killing of three people in Montgomery County, Maryland. Perry was convicted of murder, after which the survivors of the victims sued Paladin in federal court for wrongful death, alleging that Paladin had aided and abetted the murders by selling *Hit Man* to Perry. Paladin moved for summary judgment on the ground that the First Amendment barred recovery. For the purposes of the motion, the parties stipulated the following:

> 1. Paladin had no contact with Perry (or the person who hired him to commit the murders) other than to sell him *Hit Man* and another book. Paladin had no "specific knowledge" that Perry planned to commit

a crime, or that he had been retained to kill anyone. 940 F. Supp. at 839.

2. In planning, committing, and concealing his crimes, Perry followed certain descriptions and instructions in *Hit Man*, including: (a) *Hit Man*'s recommendation that a "beginner" hit man use an AR-7 rifle; (b) *Hit Man*'s instructions on how to disassemble the AR-7; (c) *Hit Man*'s detailed instructions on how to drill out the serial number on the rifle; (d) *Hit Man*'s detailed instructions on how to create a silencer to use on an AR-7; (e) *Hit Man*'s detailed instructions on how to murder victims from close range; and (f) *Hit Man*'s detailed instructions on how to file the AR-7 so that it would not be traceable. *Id.* at 839-40.[41]

3. Paladin engaged in a marketing strategy intended to maximize sales to the public, including sales to the following targeted audiences: authors who desire information for the purpose of writing books about crime and criminals; law enforcement officers and agencies who desire information concerning the means and methods of committing crimes; persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment; persons who fantasize about committing crimes but do not thereafter commit them; criminologists and others who study criminal methods and mentality; and "*criminals and would-be criminals who desire in-*

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[41] In addition, Perry followed instructional references from *Hit Man* in planning and executing the murders, including information about: how to solicit and obtain prospective clients in need of murder-for-hire services; requesting up-front money for expenses; registering at a motel in the vicinity of the crime, paying with cash and using a fake license tag number; committing the murders at the victims' home; how to make the crime scene look like a burglary; cleaning up and carrying away the ejected shells; breaking down the gun and discarding the pieces along the roadside after the murders; and using a rental car with a stolen tag. *Id.* at 840.

> *formation and instructions on how to commit crimes.*" In particular, the parties stipulated that "[i]n publishing, marketing, advertising and distributing *Hit Man* . . . , Paladin *intended and had knowledge* that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications." *Id.* at 840.[42]

The district court granted Paladin summary judgment. The court seemed to rely upon two distinct rationales for its decision: First, the court concluded that the State of Maryland has not "extend[ed] the tort of aiding and abetting to the circumstances of this case," and that "[a] federal court sitting in diversity cannot create new causes of action." *Id.* at 842. Accordingly, the court seemed to conclude that plaintiffs had failed to state a claim under Maryland tort law. *Id.* Second, the court held that, even if an aiding and abetting tort theory were cognizable, Paladin's publication and dissemination of the book was entitled to constitutional protection, and "the First Amendment acts as a bar to liability in the instant case," *id.* at 843, despite defendants' stipulation that they "intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications." *See also id.* at 843-49 (First Amendment analysis).

This recent decision suggests that it is necessary to consider carefully the First Amendment questions that a statute like the Feinstein Amendment would raise.[43]

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[42] As explained *infra* note 71, there was some dispute between the parties as to the meaning of this "intent" stipulation, and the court's resolution of that dispute affected its ultimate constitutional analysis.

[43] As we explain *infra* at 39 n.62, 43, 44-45 n.71, we think that the district court's First Amendment analysis in *Rice* is, in some respects, open to question. Plaintiffs have appealed the district court

A. *First Amendment Principles*

Other than the cursory analysis in the *Featherston* and *Foran* cases, discussed *supra* at 22-23, and the district court's recent decision in *Rice v. Paladin*, discussed *supra* at 27-28, there is little in the way of judicial analysis directly addressing the First Amendment questions that a statute like the Feinstein Amendment would raise.[44] However, the courts have substantially addressed the scope of the Free Speech Clause in three related factual contexts that serve to put the constitutional question in perspective: (i) where the government seeks to restrict the advocacy of unlawful action; (ii) where the government (or a private party using tort law) seeks to restrict or punish the general disclosure or publication of lawfully obtained information; and (iii) where the government punishes conveyance of information as part of a "speech act," such as speech that aids and abets another person's commission of a crime.

1. *Advocacy of Unlawful Action.* In the landmark case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per

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decision to the United States Court of Appeals for the Fourth Circuit. *Rice v. Paladin Enterprises, Inc.*, No. 96-2412.

[44] The Feinstein Amendment was addressed to the dissemination by private persons of bombmaking information that has not been classified. Accordingly, our discussion of the First Amendment is limited to situations in which the government seeks to restrict the dissemination of such privately generated, unclassified information. This Report does not discuss in any detail the constitutionality of governmental restrictions on its own employees' activities to ensure that those employees do not disclose classified information belonging to the government itself. *See supra* note 11. As the Supreme Court explained in *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980), such restrictions on employee conduct generally will not violate the First Amendment so long as they are a "reasonable means" of protecting the government's "compelling interest in protecting . . . the secrecy of information important to our national security." *See also, e.g., United States v. Morison*, 844 F.2d 1057 (4th Cir), *cert. denied*, 488 U.S. 908 (1988); *McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983).

curiam), the Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce that action." *Id.* at 447 (footnote omitted). This test, in other words, requires both an *intent* and a *likelihood* that the expression in question—"advocacy of the use of force or law violation"—will incite or produce *imminent* unlawful action.

A few years later, the Court made clear how demanding the *Brandenburg* test is. In *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam), the defendant was arrested for loudly stating, at an anti-war rally, "We'll take the fucking street later." The Court held that *Brandenburg* prohibited the State from punishing this alleged advocacy of illegality, principally because the defendant's statement "amounted to nothing more than advocacy of illegal action at some indefinite future time." *Id.* at 108. Furthermore, the Court reasoned that "[s]ince the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action." *Id.* at 108-09.

In light of these precedents,[45] it is doubtful that general publication of written materials advocating illegality can ever be proscribed under the *Brandenburg* test.[46] Many

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[45] *See also NAACP v. Claiborne Hardware, Inc.*, 458 U.S. 886, 927-28 (1982).

[46] *See High Ol' Times, Inc. v. Busbee*, 456 F. Supp. 1035, 1040 (N.D. Ga. 1978) (no instance in which the written word alone has ever met the *Brandenburg* test), *aff'd*, 621 F.2d 141 (5th Cir. 1980). *See also Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987) (questioning, but not deciding, whether the *Brandenburg* test could ever be satisfied by written materials), *cert. denied*, 485 U.S. 959 (1988). In the early days of the Supreme Court's First Amendment jurisprudence, by contrast, the Court repeatedly held

of the bombmaking manuals discussed by Congress and identified in this Report could plausibly be said to advocate—either explicitly or implicitly—the illegal use of explosives and other weapons. Insofar as publication of such manuals were criminalized on account of those manuals' *advocacy* of unlawful conduct, such a prohibition almost certainly could not pass constitutional muster.[47]

2. *Disclosure or Publication of Lawfully Obtained Information.* The *Brandenburg* test, by its terms, applies to *advocacy* of unlawful conduct. But the government's principal concern with respect to bombmaking manuals is not their advocacy, but the instructional *information* they contain. That information is (at least for the most part) a matter of public record. As demonstrated elsewhere in this Report, anyone interested in manufacturing a bomb, dangerous weapon or weapon of mass destruction can easily obtain detailed instructions for manufacturing and using such a device, both from legitimate publications and from so-called "underground" publications. And, presumably, most if not all of the writers and publishers of such publications do not obtain the information unlawfully, or

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that the Constitution did not protect published, written advocacy of unlawful conduct. *See, e.g., Fox v. Washington,* 236 U.S. 273 (1915); *Schenck v. United States,* 249 U.S. 47 (1919); *Frohwerk v. United States,* 249 U.S. 204 (1919); *Abrams v. United States,* 250 U.S. 616 (1919); *Gitlow v. New York,* 268 U.S. 652 (1925). The reasoning of these cases does not in any significant sense survive *Brandenburg. See Brandenburg,* 395 U.S. at 449 (expressly overruling *Whitney v. California,* 274 U.S. 357 (1927)).

[47] The First Amendment would not, however, prohibit the evidentiary use of such advocacy to demonstrate a disseminator's intent in conveying bombmaking *information. See Wisconsin v. Mitchell,* 508 U.S. 476, 489 (1993). Therefore, insofar as criminal culpability for dissemination of such information depends upon the distributors' intent—for example, upon whether a disseminator of bombmaking manuals had the conscious purpose of helping others to use the information to engage in unlawful conduct, *see infra* at 40-44—the substance of the advocacy in such manuals could be used as material evidence of such intent.

from classified sources. The First Amendment imposes significant constraints on the ability of the government to restrict publication of such information.

Although the Supreme Court has been careful to hold categorically that publication of lawfully obtained truthful information "is automatically constitutionally protected," *The Florida Star v. B.J.F.*, 491 U.S. 523, 541 (1989) nonetheless the Court has, on several occasions, held that "the government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *United States v. Aguilar*, 115 S. Ct. 2357, 2365 (1995) (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979)). *See also Butterworth v. Smith*, 494 U.S. 624, 632 (1990). And even if the state has such an interest, "punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Florida Star*, 491 U.S. at 541.[48]

We can assume that there is a "state interest of the highest order" in keeping information on how to make explosives out of hands of persons who want—or who would be likely—to use that information in furtherance

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[48] On occasion, the Court has indicated that this demanding standard applies only to information concerning "'a matter of public significance.'" *See, e.g., Florida Star*, 491 U.S. at 533 (quoting *Smith*, 443 U.S. at 103). *See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-61 (1985) (plurality opinion) (speech on matters of "purely private concern" entitled to less First Amendment protection in defamation cases); *id.* at 764 (Burger, C.J., concurring in pertinent part); *id.* at 773-74 (White, J., concurring in pertinent part). *But see Florida Star*, 491 U.S. at 541 (omitting the "matter of public significance" standard in the Court's ultimate holding, quoted in the text above). However, even if speech of "purely private concern" is entitled to a lesser degree of protection, the Court in *Florida Star* was willing to conclude that the identity of a rape victim is a "matter of public significance." If that is so, it is safe to assume the Court would find that information on how to construct explosives likewise concerns a "matter of public significance."

of violent crime.[49] What is more, it is "foreseeable," in the tort-law sense, that *some* readers will use such information for unlawful ends if the information is made publicly available. As explained in Part II of this Report, strong circumstantial evidence demonstrates that persons bent upon committing acts of terrorism often rely upon literature for guidance in the construction of explosive devices and other weapons of mass destruction. Therefore, chances are that even "legitimate" publication of bombmaking information—such as that found in government-issued manuals and in encyclopedias—will facilitate some degree of unlawful conduct.

Nevertheless, even where it is foreseeable that widely disseminated information will be used unlawfully, or in a negligent and dangerous manner, courts uniformly have found that the Constitution prohibits imposing culpability or civil liability for distributing or publishing that information. For example, a number of courts have held that the First Amendment prohibits imposing tort liability on publishers, producers and broadcasters for the foreseeable consequences of their speech where viewers or readers mimicked unlawful or dangerous conduct that had been depicted or described, even if the standards for tortious negligence or recklessness were otherwise satisfied.[50] Simi-

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[49] In *Florida Star*, the Court noted that the state's interest in "the physical safety of [rape] victims, who may be targeted for retaliation if their names become known to their assailants," was a "highly significant" interest. 491 U.S. at 537. Presumably, the governmental interest in preventing the havoc caused by explosive-related crimes is at least as, if not more, significant.

[50] *See, e.g., Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987) (First Amendment bars liability against magazine where reader accidentally committed suicide while attempting technique of autoerotic asphyxiation described therein), *cert. denied*, 485 U.S. 959 (1988); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (First Amendment bars liability against producer of motion picture where viewers killed a youth while allegedly imitating the violence depicted therein); *DeFilippo v. NBC, Inc.*,

larly, a number of courts have held that the First Amendment bars recovery for allegedly foreseeable injuries suf-

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446 A.2d 1036 (R.I. 1982) (First Amendment bars liability against television network where viewer accidentally committed suicide while attempting hanging stunt he saw on the "Tonight Show"); *Olivia N. v. NBC, Inc.*, 126 Cal. App. 3d 488 (Cal. Ct. App. 1981) (First Amendment bars liability against television network where viewers raped a minor with a bottle while allegedly imitating such a rape depicted in television drama). *See generally* Greenawalt, *Speech, Crime, supra* note 20, at 284-85 (1989):

> Certain artistic depictions and portrayals may lead some members of the audience to commit crimes, and that possibility exists in connection with work that undeniably constitutes expression as well as work whose status is more arguable. Sex and violence, and particularly violent sex, are the main subjects of concern. . . . These asserted connections are plainly an inadequate basis for holding the communicators criminally liable for the crimes that may be committed after exposure to the communication. In any real instance, the most that can be said is that the communicator disregarded a risk that what he said would cause criminal behavior, a risk of which he was aware or should have been aware. Given the extreme difficulty of estimating that in any particular instance the person who receives the communication, or even one of an audience of millions, will commit a crime as a consequence, demonstrating a substantial and unjustifiable risk of the sort needed to establish recklessness or negligence would be very hard. In any event, the First Amendment would preclude liability on those theories because courts and jurors should not be in the business of assessing the unjustifiability of risks by engaging in ad hoc weighing of the expressive value of a particular program or communication against the dangers it creates. . . . The dangers of interference with forms of expression are grave enough also to bar civil recovery when victims of crimes by consumers sue those responsible for communications on a theory of reckless or negligent causation. For example, if a viewer "acts out" a violent scene from a television drama, the victim cannot recover against the company that has shown the program. . . . If portrayals in literature, movies, television, photography, and the fine arts may ever be forbidden or made the subject of civil liability because of a propensity to cause crimes, the great danger of a particular sort of communication must be powerfully shown, and the proscribed communications must be very clearly defined.

fered by persons who were following "how-to" instructions.[51] In a third, related category of cases, courts have held that the Constitution does not permit imposition of criminal penalties or civil liability for written or visual depictions—including depictions of "factual" events—that are likely to alter (or that have in fact changed) persons' attitudes such that those persons are more likely to engage in criminal, dangerous or otherwise undesirable behavior.[52]

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[51] *See, e.g., Smith v. Linn*, 563 A.2d 123 (Pa. Super. Ct. 1989) (First Amendment barred liability against publisher of diet book after reader died as result of following diet), *aff'd mem.*, 587 A.2d 309 (Pa. 1991); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263 (Ill. App. Ct. 1985) (First Amendment barred liability against publisher of "how-to" book where reader had been injured while following instructions therein); *Walt Disney Productions, Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981) (First Amendment barred liability against producer and broadcaster of television program where child sustained injuries while seeking to reproduce a sound effect demonstrated for children on "Mickey Mouse Club"). *Cf. Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) ("[g]uided by the First Amendment and the values embodied therein," *id.* at 1036, court held that mere negligence could not form the basis of liability against book publisher where mushroom enthusiasts became ill from eating mushrooms that the book had described as safe to eat).

[52] *See, e.g., American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328-29 (7th Cir. 1985) (statute permitting civil liability against producers of depictions of sexually explicit subordination of women is unconstitutional, even accepting the premises that "[m]en who see women depicted as subordinate are more likely to treat them so" and that people are likely to "act in accordance with the images and patterns" they find in such expression), *aff'd mem.*, 475 U.S. 1001 (1986); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992) (invalidating on constitutional grounds state statute prohibiting the sale or rental to minors of videos "depicting violence"); *Eclipse Enterprises v. Gulotta*, 942 F. Supp. 801 (E.D. N.Y. 1996) (invalidating on constitutional grounds local law criminalizing sale to minors of trading cards depicting a "heinous crime, an element of a heinous crime, or a heinous criminal"); *Zamora v. CBS*, 480 F. Supp. 199 (S.D. Fla. 1979) (First Amendment bars liability against television networks to recover damages where television violence allegedly caused viewer to become addicted and de-

Florida Star explicitly leaves open the possibility that, in rare circumstances, the First Amendment might not bar sanctions for the publication of true, lawfully-obtained information.[53] Nevertheless, such an exception almost

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sensitized to violent behavior, resulting in his killing an 83-year-old woman). *See also Watters v. TSR, Inc.*, 715 F. Supp. 819 (W.D. Ky. 1989) (First Amendment bars liability against manufacturer of "Dungeons and Dragons" game for failure to warn, where "mentally fragile" person committed suicide after having become consumed with the role-playing nature and fantasy of the game), *aff'd on other grounds*, 904 F.2d 378 (6th Cir. 1990). *Cf. Winters v. New York*, 333 U.S. 507, 519 (1948) (invalidating as unconstitutionally vague a criminal law that had been construed to prohibit circulation of publications depicting violence that "influence generally persons to commit crimes of violence against the person").

The results of the First Amendment analysis do not change if these cases are alternatively viewed as involving implied *advocacy* of undesirable or unlawful conduct. For example, in *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684 (1959), the State refused to grant license for exhibition of the film "Lady Chatterley's Lover," because that film allegedly "present[s] . . . adultery as a desirable, acceptable and proper pattern of behavior." *Id.* at 685. The Court characterized the State as having "prevent[ed] the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior." *Id.* at 688. Even ten years prior to *Brandenburg*, the Court held that the Constitution "protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax." *Id.* at 689.

[53] 491 U.S. at 541. For example, although *Florida Star* strongly suggests that the government cannot impose "categorical prohibitions," *id.* at 539, on the dissemination of a prescribed type of information—without regard to scienter, the reasonableness of the disclosure, the efficacy of the restriction, and the manner in which the State otherwise can prevent the information's disclosure—the Court nevertheless implied in *Florida Star* that the First Amendment might permit liability under the common law tort of invasion of privacy for dissemination of true, lawfully obtained information, where the government has not facilitated the disclosure of the information, the information had not previously been publicized, a reasonable person would find the disclosure of the information "highly offensive," and some scienter requirement is satisfied. *Id.* at 538-40.

certainly would not be recognized where, as here, the information is already in the public domain. The Court's stringent First Amendment test for restrictions on publication of lawfully obtained information, in other words, almost certainly would not permit the government to proscribe the publication or widespread dissemination of bombmaking manuals. Where similar or equivalent information is widely available elsewhere, the Court has been unwilling to find that a restriction on publication of that information is "narrowly tailored" to address a state interest: no "meaningful public interest" can be served by further restriction under such circumstances. *Florida Star*, 491 U.S. at 535. " '[O]nce the truthful information [is] "publicly revealed" or "in the public domain," ' " its dissemination cannot constitutionally be restrained. *Id.* (quoting *Smith*, 443 U.S. at 103 (internal citation omitted)). *See also id.* at 539 (one critical problem with the rape-shield statute at issue in *Florida Star* was that it punished publication of rape victims' identities "regardless of whether the identity of the victim is already known throughout the community").[54] Congress presumably

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[54] *See also Oklahoma Pub. Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 595-96 (1976) (Brennan, J., concurring):

> Much of the information that the Nebraska courts enjoined petitioners from publishing was already in the public domain, having been revealed in open court proceedings or through public documents. Our prior cases have foreclosed any serious contention that further disclosure of such information can be suppressed before publication or even punished after publication.

An infamous case in which this principle was put to the test involved the prior restraint imposed upon publication by the periodical the Progressive of an article describing technical processes of thermonuclear weapons. *See United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), *rehearing denied*, 486 F. Supp. 5 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). While there is, to this day, substantial debate about whether the prior restraint violated the First Amendment, the district judge in that case acknowledged that such a restraint could be imposed, if at all, only

would not be willing to ban the publication and teaching of all information concerning the manufacture of explosives—including, for example, information exchanged among professional explosives manufacturers, or contained in the Encyclopedia Britannica and in government manuals. *See supra* at 24. As long as this is the case, it is hard to imagine that the First Amendment would permit culpability or liability for publication of other bombmaking manuals that have a propensity to be misused by some unknown, unidentified segment of the readership, since sources of the same information inevitably will remain in the public domain, readily available to persons who wish to manufacture and use explosives.

3. *"Speech Acts," such as Aiding and Abetting.* On the other hand, the constitutional analysis is radically different where the publication or expression of information

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because significant and dangerous information in the article was *not* "in the public realm." 467 F. Supp. at 993, 999. "[N]owhere in the public domain is there a correct description of the type of design used in United States thermonuclear weapons." *Id.* at 999. (The information at issue in that case had been classified as "Restricted Data," *id.* at 998, although the author of the article had not had access to any classified documents. *See supra* note 12 (discussing "Restricted Data" under the Atomic Energy Act).) The magazine moved for rehearing on the ground that the information was in fact in the public domain; but the district court once more found that the article "contains a comprehensive description of radiation coupling, along with [two] other . . . key concepts, that is not found in the public realm." 486 F. Supp. at 9. The plain import of the district court's decisions is that the prior restraint could *not* be imposed if the critical information were, in fact, "in the public realm." The government seemed to concede this point: During pendency of the Progressive's appeal of the prior restraint, the substance of the article *was* published in other journals, *see* L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. Colo. L. Rev. 55, 70 (1990), at which time the government moved for dismissal of the appeal, *see* 610 F.2d 819. Thereafter, the Progressive published the article, and the government never attempted to prosecute anyone for publication of the information after such information was in the public domain.

is "brigaded with action," [55] in the form of what are commonly called "speech acts." If the speech in question is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit, such "speech acts" typically may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such "conduct" takes the form of speech. " '[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of langauge, either spoken, written, or printed.' " *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). For example, as the Court in *Ohralik* explained, there are "numerous examples" of communications—including communications that convey information—that are subjected to economic or commercial regulation without implicating the First Amendment, such as: exchange of securities information; corporate proxy statements; exchange of information among competitors; and employers' threats of retaliation for employees' labor activities. *Id.* (citations omitted).[56]

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[55] *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring).

[56] A related principle is that generally applicable common-law causes of action typically will not offend the First Amendment in cases where they are applied to expressive conduct such as publication or broadcast. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (First Amendment does not bar liability for breach of contract where defendant newspaper published confidential source's name); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (First Amendment does not bar liability for tort of unlawful appropriation of "right to publicity" where television station broadcast "human cannonball" act in its entirety). However, it should be noted that the First Amendment does impose significant limits on the use of a "generally applicable" cause of action where an element of that cause of action inevitably (or almost always) depends on the communicative impact of speech or expression. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (First

Similarly, many inchoate crimes often or always are effected through speech "acts." Such crimes include conspiracy, facilitation, solicitation, bribery, coercion, blackmail, and aiding and abetting.[57] Punishing speech—including the dissemination of information—when it takes the form of such criminal conduct typically does not even raise a First Amendment question. As Justice (then-Judge) Kennedy explained, "where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone." *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986).[58]

In particular, "[t]hat 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality." *National Org. for Women v. Operation Res-*

Amendment generally does not permit liability, under the generally applicable tort of intentional infliction of emotional distress, for publication of a parody of a public figure). *See also Cohen*, 501 U.S. at 671 (distinguishing *Hustler*).

[57] *See generally* Greenawalt, *Speech, Crime, supra* note 20.

[58] *Accord United States v. Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990) ("No first amendment defense need be permitted when words are more than mere advocacy, 'so close in time and purpose to a substantive evil as to become part of the crime itself.' ") (citation omitted); *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes . . . frequently involve the use of speech as part of the criminal transaction."). This rationale applies, for instance, to conspiracies and other unlawful agreements. *See Brown v. Hartlage*, 456 U.S. 45, 55 (1982): "The fact that . . . an [unlawful] agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech." *See also United States v. Rowlee*, 899 F.2d 1275, 1278 (2d Cir.) (First Amendment does not protect speech acts constituting an illegal conspiracy), *cert. denied*, 498 U.S. 828 (1990); *United States v. Fleschner*, 98 F.3d 155, 158-59 (4th Cir. 1996) (First Amendment does not protect speech acts in furtherance of an illegal conspiracy).

cue, 37 F.3d 646, 656 (D.C. Cir. 1994).[59] What is more, aiding and abetting a crime often consists of providing factual information to another person. The role of a lookout at a burglary is to inform confederates that someone is coming. An accomplice of a bank robbery might abet the operation by telling the principal the combination of a safe, or how to evade detection. The First Amendment is simply inapposite in such cases.[60] Nor is the situation necessarily different where the information conveyed is already publicly available. For example, there may be many lawful—and constitutionally protected—circumstances in which a person (say, a professor of architecture) may provide the blueprint of a bank to other persons (say, architecture students); but if such blueprints are transferred for the purpose of assisting others in a bank robbery, and if that robbery occurs, the person providing the information is subject to accomplice culpability, even if he obtained the blueprint from a textbook, from city hall, or from the newspaper. *See also United States v. Edler Industries, Inc.*, 579 F.2d 516, 521 (9th Cir. 1978) (though the dissemination and export of technological

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[59] *Accord Barnett*, 667 F.2d at 842-43; *United States v. Buttorff*, 572 F.2d 619, 623-24 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978).

[60] *See* Greenawalt, *Speech, Crime, supra* note 20, at 85:

> Much more commonly than people commit noncommunicative crimes "purely" by communication, they cooperate, by talking, in the commission of crimes that involve noncommunicative acts. . . . The reasons of ordinary penal policy for covering communicative efforts to carry out ordinary crimes are obvious, and the criminal law sensibly draws no distinction between communicative and other acts. Although assertions of fact generally fall within a principle of freedom of speech, what these sorts of factual statements contribute to the general understanding of listeners is minimal, and the justifications from free speech that apply to speakers do not reach communications that are simply means to get a crime successfully committed. The relevance of free speech is so slight in respect to such highly specific information related to an immediate practical purpose that it can be disregarded here.

information on how to manufacture military equipment otherwise might generally be protected by the First Amendment, there is no constitutional protection for export of such information as part of "the conduct of assisting foreign enterprises to obtain military equipment"); *Constitutionality of the Proposed Revision of the International Traffic in Arms Regulations*, 5 Op. O.L.C. 202, 206-09 (1981) (discussing *Edler Industries*).

In a number of cases, persons have been convicted of aiding and abetting violations of the tax laws by providing explicit instructions to a discrete group of listeners on techniques for avoiding disclosure of tax liability. *See supra* notes 23-24. Defendants in such cases often have invoked the First Amendment; but that constitutional guarantee has rarely, if ever, been a bar to accomplice culpability. The courts correctly have rejected defendants' reliance on *Brandenburg*; and, in particular, have refused to accept defendants' arguments that the "imminence" requirements of the *Brandenburg* test apply to such aiding and abetting cases. If a defendant has aided and abetted a crime through the dissemination of information—rather than simply by urging or "advocating" that the crime be committed—then the government should not need to demonstrate that the speech was intended or likely to "incite" *imminent* unlawful conduct. The reasons the strict requirements of the *Brandenburg* test must be applied to cases of advocacy are that (i) abstract advocacy of unlawful conduct usually is closely aligned with (or sometimes part of) political and ideological speech entitled to the strongest constitutional solicitude; and (ii) the danger the speech will in fact lead to unlawful behavior often is remote and speculative. These concerns are rarely, if ever, implicated, in cases involving conduct constituting intentional and material *aid* to the criminal conduct of particular persons. It follows that the question of whether criminal conduct is "imminent" is relevant for constitutional purposes only where, as in *Brandenburg* itself, the

government attempts to restrict advocacy, as such. But the tax-avoidance aiding and abetting cases are not subject to *Brandenburg* because culpability in such cases is premised, not on defendants' "advocacy" of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes.[61]

If it were otherwise—that is, if the *Brandenburg* test applied to crimes implemented through the use of informative speech—there would, for example, be no way for the government to prohibit the aiding and abetting of a crime

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[61] For cases recognizing this distinction, see e.g., *United States v. Johnson*, 952 F.2d 565, 578 n.13 (1st Cir. 1991), *cert. denied*, 506 U.S. 816 (1992); *Rowlee*, 899 F.2d at 1279-80; *Freeman*, 761 F.2d at 552; *Buttorff*, 572 F.2d at 624 (defendants went "beyond mere advocacy": they "explained how to avoid withholding"); *People v. Bohmer*, 120 Cal. Rptr. 136, 144 n.1 (Cal. Ct. App.), *cert. denied*, 423 U.S. 990 (1975). *See also* Greenawalt, *Speech, Crime*, *supra* note 20, at 247 n.13. In *Freeman*, for example, Justice (then Judge) Kennedy concluded that, because some of the counts of the indictment arguably were premised on the defendant's abstract advocacy of tax evasion, a *Brandenburg*-like jury instruction was appropriate for such counts. *Id.* at 551-52. But where the defendant directly counseled someone on how to file false tax returns, "a First Amendment defense is foreclosed even if the prosecution rests on words alone." *Id.* at 552. Conversely, *advocacy* of unlawful conduct *is* entitled to the protection of the *Brandenburg* test, which cannot be circumvented merely by labeling such advocacy as "aiding and abetting." *See, e.g., Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548, 1556 (M.D. Ala. 1996). *See also Bond v. Floyd*, 385 U.S. 116, 133 (1966). In this regard, it is worth noting that the general federal aiding and abetting statute—18 U.S.C. § 2—punishes as a principal whoever "counsels" a federal offense. *See supra* note 22. We are not aware of any modern case in which culpability under § 2 was premised solely on "counseling" in the form of encouragement (or advocating that a crime be committed), without any actual aid or assistance to the principal. Insofar as § 2 were construed to permit culpability in such a "pure" advocacy situation, it is likely—at least absent special circumstances, such as implicit coercion or a fiduciary relationship between the pertinent parties—that the prosecution would be required to satisfy the *Brandenburg* standards. *See also supra* note 20.

that is intended to occur weeks or months after its planning. But in fact, if someone in October teaches another person how to cheat on their tax forms to be filed the following April, the person doing the teaching nonetheless can be culpable of aiding and abetting tax fraud. "The fact that the aider and abettor's counsel and encouragement is not acted upon for long periods of time does not break the actual connection between the commission of the crime and the advice to commit it." *United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982).

Just as advocacy of unlawful conduct is entitled to greater constitutional protection than the act of using speech to aid and abet such conduct, *Brandenburg* itself recognizes another, related distinction that is of equal significance for present purposes. As we explained above, the Court in *Brandenburg* held that the First Amendment renders invalid statutes that "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. Immediately after stating this constitutional requirement, however, the Court drew a sharp distinction between " 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence' " and " 'preparing a group for violent action and steeling it to such action.' " *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

As the Court made plain in *Noto* and in related cases, the latter category of conduct—"preparing a group for violent action and steeling it to such action"—is not entitled to First Amendment protection, even though advocacy ("the mere abstract teaching . . . of the moral propriety") of such violence *is* protected. Indeed, even Justice Douglas—in the course of urging strong constitutional protection for the *advocacy* of illegality—freely acknowl-

edged that "[t]he freedom to speak is not absolute; *the teaching of methods of terror* . . . should be beyond the pale." *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting) (emphasis added).

The distinction recognized in *Brandenburg* between advocacy of, and preparation for, unlawful conduct, was exemplified in *Scales v. United States*, 367 U.S. 203 (1961), a case in which the Court carefully distinguished between the teaching of abstract doctrine—punishment of which is subject to substantial constitutional constraints—and the teaching of the *techniques* of unlawful conduct, which can much more easily be proscribed. *Id.* at 233-34. As to the former, the Court has developed the *Brandenburg* test, which asks whether the danger is intended, likely and "imminent." But the constraints of the First Amendment do not apply when the "teaching" goes "beyond the theory itself" to "an explanation of 'basic strategy.'" *Scales*, 367 U.S. at 244. At that point, the teaching—if it is done with the purpose of preparing a group for unlawful action—is not much different than the information conveyed in a typical aiding and abetting case; accordingly, the *Brandenburg* protections should largely be inapposite. *See Yates v. United States*, 354 U.S. 298, 331-33 (1957) ("systematic teaching" in classes to "develop in the members of [a] group a readiness to engage [in unlawful conduct] at the crucial time," could be punished, even if that conduct was to occur only "when the time was ripe").[62]

This critical distinction—between advocacy of unlawful conduct, on the one hand, and "instructions" for un-

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[62] The district court in *Rice v. Paladin*, *see supra* at 27-28, thus erred in concluding that the *Brandenburg* standard applies to speech "which advocates *or teaches* lawless activity." 940 F. Supp. at 845 (emphasis added). As we explain in the text, the constitutional analysis can differ quite a bit depending on whether a case involves the "advocacy" or the "teaching" of lawless activity.

lawful conduct, on the other—was recognized by Professor Thomas Emerson in his seminal treatise on the First Amendment:

> [C]onduct that amounts to "advice" or "persuasion" [sh]ould be protected; conduct that moves into the area of "instructions" or "preparations" [sh]ould not. The essential task would be to distinguish between simply conveying an idea to another person, which idea he may later act upon, and actually participating with him in the performance of an illegal act. It is true that the distinction does not offer automatic solutions and that courts could easily disagree on any particular set of facts. But this process of decision making is related to the nature of "expression" and the functions and operations of a system of freedom of expression. It is therefore a rational method of approaching the problem.

Thomas Emerson, *The System of the Freedom of Expression* 75 (1970).[63]

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[63] As Professor Emerson suggests, there may not always be a bright line between "advising" a group of persons that they should engage in criminal conduct and "teaching" that same group specific techniques that the teacher intends for the group to use in such crimes: in particular factual circumstances, these are likely to be two points on a fluid continuum of conduct. Whether a particular instance of teaching will fall outside the *Brandenburg* protections for advocacy likely will depend on the "explicitness and concreteness" of the teaching. *Scales*, 367 U.S. at 253. Teaching "in the abstract" the philosophical or political beliefs of a certain author is constitutionally protected, *see id.* at 252 n.27; while, on the other end of the scale, instruction on how to use a pencil to kill a person in the case of an uprising, *see id.* at 250-51, is not protected (at least insofar as the teacher intends for the students to make use of such a technique). Somewhere in the middle are cases having aspects both of advocacy and of "teaching." For instance, exhorting a crowd of young men to "avoid the draft by feigning insanity (or burning your draft cards)" in some sense "teaches" the audience a method of unlawful conduct; but it does not really provide the audience any information it does not already know, and thus prob-

B. *Application of First Amendment Principles to Dissemination of Bombmaking Information*

Having reviewed the role of the First Amendment in these three related contexts, we now can address specifically the circumstances under which Senators Feinstein and Biden would seek to proscribe dissemination of bombmaking information.

1. *Dissemination with the "Intent" to Facilitate Unlawful Conduct.* The Feinstein Amendment would make it unlawful, *inter alia*, for any person to "teach or demonstrate" the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, where the person "*intend*[*ed*]" that such information would be used for, or in furtherance of, an activity that "constitutes a Federal criminal offense or a criminal purpose affecting interstate commerce." In light of the foregoing discussion in Part VI-A, two things about the constitutionality of this "intent" prohibition are clear:

First, the First Amendment almost certainly would require that the "intent" scienter provision in such a statute be construed to mean an actual, conscious purpose to bring about the specified result. "Intent" may not be construed as "constructive intent," as in the civil tort context; that is to say, "intent" could not constitutionally be inferred solely by virtue of the fact that criminal offenses were a foreseeable result—a "natural consequence"—of the general distribution of bombmaking information. Anyone who teaches or publishes bombmaking information—including those who do so for wholly legitimate reasons, such as explosives manufacturers, the miltiary, and encyclopedia publishers—could foresee that *some* unknown

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ably should more appropriately be viewed as a form of advocacy entitled to some constitutional solicitude (albeit not as much as that to which "pure" advocacy is entitled).

recipient of the teaching or information will use it for unlawful ends; but the First Amendment would not permit culpability on that basis. *See supra* at 30-34. Instead, an "intent" element must be construed to reach only the person who disseminates the information for the *purpose* of facilitating criminal conduct.[64]

Second, a prosecution relying upon an "intent" requirement plainly would be constitutional where the teacher intends that a *particular* student—or a discrete group of students—use the information for criminal conduct. Indeed, if there is such an intent, and a receiver of the information thereafter *does* use that information to commit a crime, the person who assisted him by showing him how to do so would be culpable as an aider and abettor, and the First Amendment would not bar such accomplice culpability. *See supra* at 36-39. The constitutional analysis should be the same, as in the *Featherston* case, where the teacher *intends* that particular students use the information for unlawful ends, but the crime is never committed (such as when the scheme is foiled by detection). This would be, in essence, a form of "attempted aiding and abetting." Although presently there is no general federal statute prohibiting "attempted aiding and abetting," *see supra* at 20, that is not because of any constitutional bar: application of such a statute to the provision of information would not transgress the First Amendment. Therefore, a statute like the Feinstein Amendment could constitutionally be applied to a case where the person supplying the critical training or information has the intent thereby to assist a particular recipient thereof in unlawful

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[64] *See also Gorin v. United States*, 312 U.S. 19, 27-28 (1941) (in order to avoid a serious constitutional question, Court construes "intent" requirement in espionage statute dealing with dissemination of information to "require[] those prosecuted to have acted *in bad faith*") (emphasis added).

activity, whether or not the crime eventually occurs.[65] As the Court emphasized in *Brandenburg* and in earlier cases, the Constitution does not protect the conduct of "preparing a group for violent action" by teaching the techniques of unlawful conduct. *See Noto*; *Scales*; *Dennis*, 341 U.S. at 581 (Douglas, J., dissenting); Emerson, *System of Freedom*, *supra*, at 75; Greenawalt, *Speech, Crime*, *supra* note 20, at 244-45.[66]

The more difficult question is whether criminal culpability can attach to *general publication* of explosives information, when the writer, publisher or seller of the information has the purpose of generally assisting unknown and unidentified readers in the commission of crimes. This is, in essence, the situation alleged in the recent *Rice v. Paladin* case. *See supra* at 27-28. To be sure, such a "generalized" attempt to aid crime through publication is "not the same as *preparing a group* for violent action." *Noto*, 367 U.S. at 298. The "joint participation" in a crime that is the hallmark of conspiracy or aiding and abetting is absent here: the speech is not, in any direct sense, "brigaded with action." What is more, the danger to the public in such a case is not necessarily

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[65] Perhaps the First Amendment would impose a requirement that there be some realistic risk that the crime will occur. For example, if the information is conveyed to persons who would not under any circumstances use it for unlawful ends, the threat of danger is so remote that the speech arguably should not be punished regardless of bad intent. Courts might find, for example, that culpability can attach only where the defendant both intended and had reason to believe that the information would or could be unlawfully used. *Cf. United States v. Dworken*, 855 F.2d 12, 19 & n.6 (1st Cir. 1988).

[66] It is important once again to distinguish *training* with bad intent from *advocacy* with bad intent. Though a purpose to facilitate a crime is sufficient to permit punishment of the former, such a bad purpose is necessary but *not* sufficient when it comes to restrictions on pure advocacy; in the latter case, *Brandenburg* imposes the additional requirements (i) that the speech be directed to inciting *imminent* crime, and (ii) that such imminent wrongdoing is likely to occur, in fact.

greater than that caused by the same exact publication that is made solely for permissible purposes. The constitutional question is, therefore, more difficult than in the case of intentional *concerted* action discussed above.

There are few, if any, cases directly on point.[67] However, in *Haig v. Agee*, 453 U.S. 280 (1981), the Court suggested that otherwise privileged publication of information can lose its First Amendment protection when the publisher has an impermissible motive. In *Agee*, a former CIA employee had his passport revoked as a result of his campaign to publish the names of (and otherwise publicly

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[67] For example, the cases where a private party has sought to impose tort liability on the basis of "negligent" or "reckless" publication or broadcast, *see supra* at 31-33 & notes 50-53, have not involved situations where the publisher or broadcaster had the *purpose* of fomenting criminal conduct. Such intent is present in aiding-and-abetting and conspiracy cases, but in those cases, the person providing the information is, in a much more direct sense, actually participating with the recipient of the information in the performance of an illegal act.

The precedents that come closest to the situation described in the text are the aiding-and-abetting decisions in *Buttorff* and *Barnett*. *See supra* note 24. In *Buttorff*, the court of appeals rejected a First Amendment argument where the "joint participation" consisted of tax-evasion instructions that defendants provided at "large public gatherings," presumably to persons they did not personally meet. 572 F.2d at 622-23. In *Barnett*, a First Amendment argument was rejected (albeit in the context of determining whether there was probable cause for a warrant to search premises) where the only contact between the accomplice and the principal was that the latter received from the former mail-order instructions for the manufacture of phencyclidine, along with the name of a "reliable" chemical supplier, in exchange for the $10 purchase price. 667 F.2d at 840. As explained in note 24, *supra*, there is some question whether aiding and abetting can be established by virtue of arms-length transactions such as those in *Buttorff* and (especially) *Barnett*. But that is quite a different question than whether the Constitution would *bar* such culpability. Insofar as those cases hold that there is *no First Amendment defense* for transmission of information with the intent to facilitate crimes, they are consistent with the conclusion we reach in the text above.

identify) intelligence agents working in foreign countries, a course of conduct that undermined intelligence operations and endangered agents. In the context of this serious threat to American national security, the Court held that the First Amendment did not protect Agee's publication of the agents' names. In so ruling, the Court stressed the following:

> Agee's disclosures, among other things, have the declared *purpose* of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution. The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law.

Id. at 308-09 (emphasis added). The Court did not indicate whether Agee's bad intent was, in and of itself, sufficient to strip his speech of its constitutional protection. In particular, the Court had no occasion to determine whether the First Amendment analysis would be the same if the information Agee published was already in the public domain and/or if the government's interests were not as significant as the protection of intelligence sources.

Nonetheless, in the absence of contrary authority, this passage in *Haig v. Agee* supports the argument that the government may punish publication of dangerous instructional information where that publication is motivated by a desire to facilitate the unlawful use of explosives.[68] At

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[68] The recent case of *United States v. Aguilar*, 115 S. Ct. 2357 (1995), provides further support for permitting prohibition of improperly motivated publication of dangerous instructional information. The defendant in that case urged a narrow construction of a statute banning disclosure of wiretap authorizations, on the ground that a broad reading of the statute would threaten to violate the principle that "the government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *Id.* at 2365 (quoting *Smith*, 443 U.S. at 103). The Court, while en-

the very least, publication with such an improper intent should not be constitutionally protected where it is foreseeable that the publication will be used for criminal purposes; and the *Brandenburg* requirement that the facilitated crime be "imminent" should be of little, if any, relevance.[89] Accordingly, we believe that the district court

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dorsing that basic principle, nonetheless rejected defendants' argument, in part on the ground that "the statute here in question does not impose such a restriction generally, but only upon those who disclose wiretap information 'in order to [ob]struct, impede, or prevent' " a wiretap interception. *Id.* (quoting 18 U.S.C. § 2232(c)).

There are many other contexts, as well, in which First Amendment protection depends upon whether a speaker has some "bad" intent, rather than on the degree of harm that the speech might cause. For example, advocacy of unlawful action will be treated very differently under *Brandenburg* depending on whether it is "directed to" inciting imminent unlawful conduct, even though such a bad intent does not ordinarily increase the threat to public safety. Similarly, under the earlier Smith Act cases, the Court, in order to avoid serious constitutional questions, strained to construe the Act to require bad intent, even though such intent should not have been relevant if, as the Court insisted, the touchstone for constitutional analysis was the risk of a "clear and present danger." *See, e.g., Scales*, 367 U.S. at 221-22, 229-30; *Dennis*, 341 U.S. at 499-500 (plurality opinion). *See also id.* at 516 (defendants' intent and their "power to bring about the evil" were separate necessary elements of the offense). And, most famously, the First Amendment prohibits imposition of liability for publication of a false and defamatory statement about a public figure, unless the publisher acts with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard of whether it was false or not. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Similarly, the Court in *Florida Star* suggested that, whereas the categorical prohibition on the publication of rape victims' names at issue in that case was unconstitutional, the constitutional calculus might be different if the statute included a scienter requirement. 491 U.S. at 539.

[89] *See* Greenawalt, *Speech, Crime, supra* note 20, at 273: "The constitutional standard here should be that a person intend that the crime be committed and that it be reasonably likely that it will be committed in the 'near future.' " *See also supra* note 65.

in *Rice v. Paladin, see supra* at 27-28, erred insofar as it concluded that *Brandenburg* bars liability for dissemination of bombmaking information *regardless* of the publisher's intent. *See also infra* note 71.

Having said that, we should note that where there is no concerted action between the publisher and any particular recipient of the information, there might be a significant problem in proving that the person publishing the information has done so with an impermissible purpose. Most publishers of the bombmaking materials in question will argue that their publication is well-intentioned. For example, in *Rice*, the publisher of *Hit Man* has asserted that its intended audience includes: authors who desire information for the purpose of writing books about crime and criminals; law enforcement officers and agencies who desire information concerning the means and methods of committing crimes; persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment; persons who fantasize about committing crimes but do not thereafter commit them; and criminologists and others who study criminal methods and mentality. *See supra* at 28.

Nevertheless, proof of improper intent might be possible in certain types of cases. In many cases the manuals themselves might have "the *declared* purpose," *Agee*, 453 U.S. at 309, of facilitating crime. Although, under *Brandenburg*, culpability cannot attach merely because the manuals advocate unlawful action, such advocacy could constitutionally be used as probative evidence that the disseminator of accompanying information on the techniques of bombmaking intended by such dissemination to facilitate criminal conduct. *See supra* note 47. What is more, if a publisher of such communications engages in a marketing strategy intended to maximize sales to, *inter alia*, "criminals and would-be criminals who desire information and instructions on how to commit crimes," as the publisher of *Hit Man* allegedly did, and if that

publisher's economic success evidently depends upon stimulating a high volume of unlawful use of his product —*i.e.*, the publisher's fortunes substantially rise or fall depending on the degree to which his product facilitates unlawful conduct—there might be sufficient evidence of improper intent. *See Direct Sales*, 319 U.S. at 712-13 (where seller of dangerous drugs—which could be used both for proper and improper purposes—engaged in marketing strategy to stimulate sales to would-be criminals, and where seller had a "stake in the venture," it was permissible to infer intent to assist criminal operation). As Justice Holmes explained in a related context, it is fair to assume that items are "designed for" unlawful use where they are "offered for sale in such a mode as purposely to attract purchasers who wanted them for the unlawful [use]." *Danovitz v. United States*, 281 U.S. 389, 397 (1930).

Finally, if, as Senator Feinstein believed, some of the information contained in the bombmaking manuals has no use *other than* to facilitate unlawful conduct,[70] that fact, too, would be evidence of an intent to facilitate crime (at least with respect to that particular information). Publishers of such information undoubtedly would argue that such information has uses other than to facilitate unlawful conduct—such as to educate law enforcement officials and would-be murder-mystery writers, and simply to entertain persons who enjoy reading accounts of the workings of the criminal mind. *See supra* at 28 (describing claims made by publisher of *Hit Man*). But

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[70] *See* 141 Cong. Rec. S7683 (daily ed. June 5, 1995) (statement of Sen. Feinstein) (describing instructions from the Terrorist Handbook for construction of items—such as "toilet paper roll booby traps" and "baby food bombs"—the sole purpose for which allegedly is "to kill somebody"). *Cf. Posters 'n' Things, Ltd. v. United States*, 511 U.S. 513, 521 & n.11 (1994) (construing statutory prohibition on sale of items "primarily intended . . . for use" with drugs to cover "multiple-use" items for which the "likely use" by "customers generally" is drug-related).

that assertion would only raise, rather than resolve, the critical question of fact regarding a publisher's intent; it would remain an issue for the trier of fact to determine whether one of the publisher's purposes was to facilitate criminal conduct.

We acknowledge that in many cases, there may be a broad and diverse audience for such communications, including persons who would not use the information as a blueprint for crime, and the communications might have substantial value other than to facilitate crimes. In such cases, courts might agree that "a strict rule about finding intent is especially important, lest a jury convict because of outrage over the facts someone has chosen to disclose. A person should not be punished for encouraging a general crime like murder by publicly disclosing facts unless the prosecution's evidence leaves no possible doubt that his purpose has been to aid or cause that criminal result." Greenawalt, *Speech, Crime, supra* note 20, at 273. But where such a purpose is proved beyond a reasonable doubt, as it would have to be in a criminal case, the First Amendment should be no bar to culpability.[71]

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[71] In a civil case, on the other hand, Professor Greenawalt's concern about constraining juries' discretion would be more directly implicated, but the First Amendment should be no bar where an improper intent is proved by clear and convincing evidence. *See, e.g., Masson*, 501 U.S. at 510; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). In *Rice v. Paladin* itself, the publishers of *Hit Man* had no specific knowledge that they had sold the book to particular persons who planned to commit a crime. Therefore, for reasons discussed in this Report, the First Amendment would permit liability to attach only if defendants had the requisite "intent" that *Hit Man* be used to facilitate crimes. For purposes of summary judgment, defendants stipulated that they "intended" that "their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications." Joint Statement of Facts ¶ 4b (referenced at 940 F. Supp. at 840). That concession would, for purposes of summary judgment, seem to foreclose a constitutional defense, except for the fact that defendants argued (in their briefs) that all they meant by this stipulation of "intent" was that they "knew" the information contained in *Hit Man* would be read and used by

2. *Dissemination with the 'Knowledge" that a Particular Recipient of the Information Intends to Use It in Furtherance of Unlawful Conduct.* The Feinstein Amendment also would have made it unlawful, *inter alia*, for any person to "teach or demonstrate" the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, if the person "*knows*" that such information will be used for, or in furtherance of, "an activity that constitutes a Federal criminal offense or a criminal purpose affecting interstate commerce." As Senator Biden explained, this "knowledge" provision was intended to address the case where the person disseminating the information has evidence that a *particular* potential recipient plans to use that information to engage in unlawful activities—for example, when the person requesting the information expressly indicates that he plans to use the information to learn how to commit violent crimes. *See supra* note 38.

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an audience that includes criminals. *See* Memorandum of Points and Authorities in Support of Defendant Paladin Enterprises, Inc.'s Motion for Summary Judgment, at 14; Reply Memorandum of Points and Authorities in Support of Defendant Paladin Enterprises, Inc.'s Motion for Summary Judgment, at 14-15. In other words, defendants argued that they had stipulated to "intent" only in the sense that that concept is understood in the civil tort context: *i.e.*, one "intends" the natural consequences of one's acts. Accordingly, defendants argued, they only "intended" that *Hit Man* would be used for unlawful purposes in the same way that Stephen King "intends" his novels will be used for unlawful purposes: in both cases, the publisher allegedly "knows" that publication likely will "produce" unlawful conduct by some, unknown, reader or readers. Reply Memorandum of Points and Authorities in Support of Defendant Paladin Enterprises, Inc.'s Motion for Summary Judgment, at 15. As we have explained in this memorandum, the First Amendment does not permit a publisher of factual information to be subject to liability merely on the basis of this type of "intent." *See supra* at 30-34. Invoking this principle, the district court in *Rice* granted Paladin's motion for summary judgment, but only because the court *accepted* Paladin's representation that the stipula-

It is questionable whether the statutory scienter requirement ("knows") in the Feinstein Amendment would suffice to cover such a situation. As explained above, *supra* at 21 & note 32, where a statutory element of "knowledge" refers to a possible future result of a defendant's conduct, the government typically must prove that the defendant was "aware 'that that result is *practically certain* to follow from his conduct.'" *United States v. Bailey*, 444 U.S. 394, 404 (1980) (citations omitted). Thus, even where someone expressly states that he desires to purchase a product in order to plan a crime, it might be difficult to persuade the trier of fact that it was "practically certain" that the crime would be committed (particularly if, as it turned out, the crime was *not* in fact com-

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tion of "intent" meant only that Paladin "knew" that some readers would misuse the book's information. 940 F. Supp. at 846.

However, even assuming *arguendo* that the defendants' own construction of the "intent" stipulation were correct, that still would not justify the grant of summary judgment, since it would leave *unanswered* the question whether Paladin also had the specific *purpose* of facilitating murder. Paladin stipulated (for purposes of summary judgment) that it engaged in a marketing strategy intended to maximize sales to the public, including to "*criminals and would-be criminals who desire information and instructions on how to commit crimes.*" As we explain in the text, if Paladin in effect encourages unlawful use of its product so that it can increase its profits—for instance, if *Hit Man* is "offered for sale in such a mode as purposely to attract purchasers who want[] [it] for the unlawful [use]," *Danovitz*, 281 U.S. at 397—or if there is other evidence that Paladin publishes *Hit Man* with the actual purpose of furthering criminal conduct, the publisher might be found to have sold *Hit Man* for the purpose of facilitating murder. If the finder of fact determined that *that* "intent" was proved by clear and convincing evidence, the First Amendment should not bar liability. We also should note, however, that, wholly apart from the First Amendment question, it is not clear whether the plaintiffs in *Rice* alleged a cognizable "aiding and abetting" tort claim under Maryland law, a question that we have no occasion to address. *But see supra* note 24 (discussing whether, under federal criminal law, aiding and abetting can be established by virtue of arms-length transactions with anonymous purchasers).

mitted). It would, therefore, be helpful to identify a more carefully tailored mens rea requirement in order to address Senator Biden's hypothetical situation.

The scenario Senator Biden describes brings to mind other types of "facilitation" statutes, such as state statutes making it a crime to "provide" a person with "means or opportunity" to commit a crime, "believing it probable that he is rendering aid to a person who intends to commit a [crime]." N.Y. Penal Law § 115.05 (McKinney 1996).[72] Such statutes, however, are of general applicability: they do not single out a particular *form* of facilitation, such as facilitation involving conveyance of information, for especially harsh treatment. And what is more, conviction under such statutes—as under the federal aiding and abetting statute, 18 U.S.C. § 2—requires that the facilitation actually result in the commission of a crime.[73]

A closer analogy, therefore, might be another section of the AEDPA itself. Section 706 of the AEDPA makes it a felony to "knowingly transfer[] any explosive materials, knowing *or having reasonable cause to believe* that such explosive materials will be used to commit a crime of violence . . . or drug trafficking crime." 110 Stat. at 1295-96 (to be codified at 18 U.S.C. § 844(o)).[74] The "reasonable cause to believe that [the item] will be used

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[72] *See also* Ariz. Rev. Stat. Ann. § 13-1004 (1996); Ky. Rev. Stat. Ann. § 506.080 (Baldwin 1996); N.D. Cent. Code § 12.1-06-02 (1995).

[73] As far as we can tell, there are no published opinions concerning the use of such statutes to prosecute facilitation committed by way of conveying information, nor have such statutes ever been the subject of a First Amendment challenge.

[74] Similar prohibitions using a "reasonable cause to believe that the product will be unlawfully used" standard are found in statutes dealing with chemicals and equipment that can be used to produce controlled substances. *See, e.g.*, 21 U.S.C. §§ 841(d)(2) (distribution of chemicals), 843(a)(7) (distribution and export of chemicals, equipment, and other products), 960(d)(3), (4) (export of chemicals).

[for the unlawful purpose]" standard would seem to address directly the case where the recipient of the product indicates an intent to use it to commit or to facilitate a crime. The constitutional question then becomes whether such a standard can be used where the item being transferred is not "explosive materials," as in AEDPA section 706, but instead *information* on how to manufacture or use such materials.

There is little case law directly on point. As Professor Greenawalt points out, however, this case is not quite as easy from a First Amendment perspective as "attempted aiding and abetting," which can constitutionally be proscribed because it requires a specific purpose to actually assist in the commission of the crime:

> It is only a minor impairment of freedom to tell people they cannot provide information they *want* to be used for a crime. It is somewhat more serious to tell them that, even if they have no such purpose, they must keep their mouths shut. A speaker may conceivably think a communication has significant value for the listener beyond the listener's immediate purpose, but, even if the speaker does not think that, perhaps a recognition of the speaker's autonomy should include allowing him ordinarily to say what he believes to be true to his acquaintances, regardless of the use he thinks they plan to make of it.
>
> A further argument against such liability is the problem of determining facts accurately and the effect of the resulting uncertainty on people who speak. If people become aware that they can be treated as criminal for providing information they believe will aid a crime, they may hesitate to give information when they think there is some modest chance of criminal use, not trusting that prosecutors and jurors will always be discerning about perceptions of relevant probabilities.

> The implications for free speech are serious enough to warrant careful attention to the problem of communications that facilitate.

Greenawalt, *Speech, Crime, supra* note 20, at 86-87.

There are two principal reasons why a "facilitation through speech" prohibition without an "intent" requirement would raise serious First Amendment problems. First, such a facilitation prohibition would be directed specifically and uniquely at facilitation effected *by way of conveying information*. In other words, it would not prohibit facilitation, as such, but only a speech-related subset of such conduct. "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1512 (1996) (plurality opinion). The constitutionality of the prohibition therefore is not as clear as it would be if "facilitation through speech" were just one form—*i.e.*, one application—of a generally applicable facilitation statute that did not refer specifically to speech. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-71 (1991) (whereas First Amendment is not implicated by application of "generally applicable laws" to violations involving speech or the press, there is a greater constitutional problem where, as in *Florida Star*, the "State itself define[s] the content of publications that would trigger liability").

Second, as explained above, *supra* at 30-34, the First Amendment traditionally has been understood to prohibit the use of the criminal or tort law to punish the dissemination of lawfully obtained factual information absent an impermissible purpose for such dissemination; and this is so even where such publication has a "propensity" to be misused by someone in a criminal or tortious manner. Yet that is, in a sense, precisely what a facilitation prohibition would do in Senator Biden's scenario: it would

punish distribution of lawfully obtained information because the disseminator had reason to believe that such distribution would result in some harm.

Although the matter is far from certain, in the end we think these First Amendment concerns can be overcome, and that such a facilitation prohibition could be constitutional, if drafted narrowly. To be sure, the prohibition would be "speech-specific." But, as with respect to 18 U.S.C. § 231(a)(1), *see supra* at 21-23, Congress would be singling out "teaching" and "informational" facilitation of crime not because of any hostility to speech itself, but because those are the forms of facilitation that are the most apparent threats to safety not already addressed by accomplice and conspiracy prohibitions and by the facilitation prohibitions found in sections 323 and 706 of the AEDPA. Congress arguably would simply be filling in a statutory gap, rather than expressing a general hostility to any particular viewpoint. Accordingly, the constitutional problems should be minimized. *See Edler Industries*, 579 F.2d at 520-22 (whereas First Amendment would prohibit export restrictions dealing with general "interchange of scientific and technological information," it is constitutional to restrict such export where the exporter knows or has reason to know that the recipient of the information will use it to produce or operate munitions). *See also Constitutionality of the Proposed Revision of the International Traffic in Arms Regulations*, 5 Op. O.L.C. 202, 207-08 (1981).

Furthermore, such a prohibition could be, in constitutionally significant respects, less problematic than a statute or tort that punishes speech having a propensity to be misused by some *unknown* recipient. In the latter type of tort and criminal cases, the practical effect of a penalty would be to deter altogether the dissemination of the information, since there is always a change that some reader, listener or viewer will turn the information to bad use,

and the only way to avoid this risk is to cease speaking altogether. Indeed, even where there would in fact be only a slim likelihood that the information would be misused, a jury might be expected to find the requisite degree of "recklessness," particularly if—as is likely in such cases—the jury is hostile to the message conveyed in the information and does not believe that it serves any social utility to distribute such information. The risk of such an outcome effectively could chill the "legitimate" dissemination of bombmaking information even if there is but a slight risk of its misuse.[75] By contrast, a facilitation prohibition *tailored to particular recipients who are likely to make criminal use of the information* would not have such a broad chilling effect on such speech. The person conveying the information would be required only to withhold its distribution to particular persons who pose an apparent risk, and otherwise would be able to continue general publication, distribution or sales. In other words, such a prohibition would only restrict or deter certain particular transactions, but would not impede general publication.

In drafting a constitutional facilitation statute, we think the safest strategy would be to address Senator Biden's scenario directly—for example, by barring dissemination of bombmaking information to a particular person, where the disseminator knows that such person *intends* to use the information for an unlawful purpose. Under such a statute, the requisite "knowledge" would not be of a *future* event, but instead, of someone else's *present* intent. Therefore, the government would not be required to prove that the disseminator was "practically certain" of the recipient's intent. *See supra* at 21 (discussing "practical certainty" standard for "knowledge" of future events). Instead, it should suffice to prove that the person providing the infor-

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[75] *See supra* note 50 (quoting Greenawalt, *Speech, Crime, supra* note 20, at 284-85).

mation was aware of a "high probability" that the recipient had an intent to use the information to commit a crime. *See, e.g., Barnes v. United States*, 412 U.S. 837, 845 (1973); *Turner v. United States*, 396 U.S. 398, 416 & n.29 (1970); *Leary v. United States*, 395 U.S. 6, 46 n.93 (1969).[76] That "knowledge" typically should be

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[76] *See also, e.g., United States v. Hayden*, 64 F.3d 126, 133 (3d Cir. 1995) (citing *United States v. Caminos*, 770 F.2d 361, 365-66 (3d Cir. 1985)); *United States v. Honeycutt*, 8 F.3d 785, 787 (11th Cir. 1993), *cert. denied*, 511 U.S. 1024 (1994); *United States v. Feroz*, 848 F.2d 359, 360 (2d Cir. 1988); *United States v. Corral-Martinez*, 592 F.2d 263, 269-70 (5th Cir. 1979). This standard is derived from § 2.02(7) of the Model Penal Code:

> When knowledge of the existence of a particular fact is an element of an offiense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

The Ninth Circuit recently held that the § 2.02(7) "aware of a high probability" standard is appropriate "only in situations where the evidence justifies an argument of willful blindness," and that absent a willful blindness situation the government must prove that the defendant had "actual knowledge or awareness" of the existence of the fact constituting an element of an offense. *United States v. Aguilar*, 80 F.3d 329, 332 (9th Cir. 1996) (en banc). We take issue with this holding. The Model Penal Code definition of "knowledge" conforms to the common understanding of knowledge, and that definition should be used regardless of whether a case involves an issue of "willful blindness." *See* Jonathan L. Marcus, Note, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231 (1993). To require that a criminal defendant achieve certainty before he can be said to "know" an operative fact would preclude conviction in virtually any case in which a defendant has committed an offense in reliance on information supplied by others. But most of what we "know" as historical fact has been related to us orally or in writing. Indeed, as Justice (then Judge) Kennedy explained in a case involving a related question:

> [W]e commonly act on less than complete information and in this world may never know one-hundred-percent certainty. "'Absolute knowledge can be had of very few things,' said the Massachusetts court, and the philosopher might add 'if any.' For most practical purposes, "knowledge" is not confined to

found where, as in the cases hypothesized by Senator Biden, the recipient clearly indicates to the disseminator a desire to use the information for criminal purposes.[77]

Alternatively, Congress could decide to track the language of section 706 of the AEDPA, such as the following:

> It shall be unlawful for any person to teach or demonstrate to any particular person the making of explosive materials, or to distribute to any particular person, by any means, information pertaining to, in whole or in part, the manufacture of explosive materials, with *reasonable cause to believe* that such particular person will use such teaching, demonstration or information for, or in furtherance of, an activity that constitutes a Federal criminal offense or a criminal offense affecting interstate commerce.

That formulation would almost certainly cover the case where the recipient of the information expressly indicates an intent to use such information to commit or to facilitate a crime, and would likely be constitutional as applied to such a case. However, such a "reasonable cause to believe" standard might also deter widespread, general publication of such information where a publisher is aware that certain suspicious persons are in the audience."[78] Because of this risk of chilling substantial publi-

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what we have personally observed or to what we have evolved by our own cognitive faculties.' "

United States v. Jewell, 532 F.2d 697, 706 n.6 (Kennedy, J., dissenting) (9th Cir.) (quoting Rollin M. Perkins, *Criminal Law* 775 (2d ed. 1969) (internal citations omitted)), *cert. denied*, 426 U.S. 951 (1976).

[77] *See, e.g., Leary*, 395 U.S. at 47 (defendant's "knowledge" that marijuana was imported can be established if supplier told defendant the source of the drugs).

[78] For example, persons who, with no bad intent, post information to certain Usenet newsgroups on the Internet may have reason to know that a certain subscriber to that service often expresses

cation of such information to persons who will *not* use it unlawfully, such a statute would run a greater risk of constitutional invalidation than a statute (such as that described above) that is more narrowly tailored to the particular hypothetical described by Senator Biden.[79]

C. *Proposed Modification of the Feinstein Amendment*

For the reasons discussed in the preceding sections, the Feinstein Amendment would be more likely to reach all of the fact situations that Senators Feinstein and Biden

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intense hatred of the government. While it is uncertain whether a fact-finder would conclude that such knowledge constitutes "reasonable cause to believe that [that subscriber] will use such information for, or in furtherance of," a crime, the chill caused by the risk of such a finding would raise significant First Amendment questions, because, unless there were a way to prevent access to the suspicious person, the content-provider might have little choice but to cease her "postings" altogether. Similarly, a person demonstrating the proper use of explosives to a classroom full of well-intentioned students (or purchasers of the product) may sense that a particular student seems suspicious, or may discover that one listener asks questions that might subtly suggest an improper motive for wanting to learn the techniques in question. The possible application of a facilitation prohibition to such a case might well cause the teacher to cease instruction (or, at the very least, exclude the suspicious-looking persons, where that is feasible). Because of this possibility, courts might be more inclined to question the constitutionality of the prohibition.

[79] Moreover, as Professor Greenawalt argues, it is unlikely that the First Amendment would permit criminal culpability to attach on a "facilitation" theory absent the speaker's knowledge of a *substantial* risk that the communication will facilitate a crime:

> My own sense is that a legislature may appropriately accept whatever curtailment of expression is involved in a prohibition on facilitation that the actor believes is likely . . . . However, a principle of free speech provides a powerful reason why liability should not extend to all negligent or reckless acts of communication, that is, to situations where the speaker is wholly unaware of the use to be made of what he says or thinks there is only some modest risk it will be used for a criminal purpose.

Greenawalt, *Speech, Crime, supra* note 20, at 87.

wished to address, and would be more likely to pass constitutional muster in most or all of its applications, if it were modified to read as follows:

> It shall be unlawful for any person—
>
> (a) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of such an explosive, device or weapon, intending that such teaching, demonstration or information be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a State or local criminal offense affecting interstate commerce; [80] or
>
> (b) to teach or demonstrate to any particular person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any particular person, by any means, information pertaining to, in whole or in part, the manufacture or use of such an explosive, device or weapon, knowing that such particular person intends to use such teaching, demonstration or information for, or in furtherance of, an activity that constitutes a Federal criminal offense or a State or local criminal offense affecting interstate commerce.
>
> For purposes of this section, the term "explosive" has the meaning set out in 18 U.S.C. § 844(j). The term "destructive device" has the meaning set out in

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[80] In order to be sustained under the First Amendment, the "intent" scienter requirement in this prohibition must be understood to refer to cases where the person disseminating the information has a "conscious purpose" that it be used unlawfully, or (at the very least) a material stake in seeing that it be used for such purposes. "Intent" should not be construed to encompass cases where criminal activity is not in fact the intended result, but is merely a "foreseeable" result, or a "natural consequence," of the publication of the information in question. *See supra* at 30-34, 40.

18 U.S.C. § 921(a)(4). The term "weapon of mass destruction" has the meaning set out in 18 U.S.C.A. § 2332a(c)(2).

The principal differences between this proposal and the Feinstein Amendment itself are the following:

1. The Feinstein Amendment could be construed to impose culpability if the person disseminating the information has reason to know that *some* unidentified, unspecified recipient thereof will use the information for an unlawful purpose, or if such an outcome is the "natural consequence" of publication of the information. Because that construction could cover virtually all public dissemination of such information, it would raise serious constitutional questions. The alternative formulation specifies that the person who disseminates the information must either have the specific purpose of facilitating criminal conduct, or must have knowledge that a *particular* recipient intends to make improper use of the material. This should, for example, address Senator Biden's example of a sale of a bombmaking manual to a purchaser who has requested it for the express purpose of using such information to accomplish an unlawful end. In such a case, a well-intentioned distributor of the information will be prohibited from providing the information to the requesting party, but may otherwise freely offer the item for sale.

2. Under the Feinstein Amendment, it would be unclear whether criminal culpability would attach where someone disseminates dangerous information about explosives with a conscious purpose of facilitating unlawful conduct by unknown recipients of the information. The alternative formulation would make clear that dissemination with such a specific purpose would be proscribed. While the constitutionality of particular applications of such a prohibition might be somewhat uncertain (depending on whether the evidence truly demonstrates the improper intent beyond a reasonable doubt), we believe

that the "intent" prohibition would be facially constitutional.[81]

3. The alternative formulation would make clear that the "intent" or "knowledge" element refers to the use made of the information that the person disseminates. Accordingly, it does not include the Feinstein Amendment's language regarding "such explosive materials," because that phrase did not have a clear referent: the prohibition should involve dissemination or teaching of information, not dissemination of the explosive materials themselves (which is independently addressed elsewhere in Title 18 and in the AEDPA).

4. The alternative formulation would broaden the Feinstein Amendment to bring within its ambit teaching and information concerning not only explosives (as defined in 18 U.S.C. § 844(j)), but also all destructive devices (as defined in 18 U.S.C. § 921(a)(4)) and other weapons of mass destruction (as defined in 18 U.S.C.A. § 2332a (c)(2)).

5. The alternative formulation would broaden the Feinstein Amendment to cover information about the "use" of explosives, in addition to the manufacture thereof. In the wrong hands, information on how to use explosives (such as the information in *Hit Man* that was used to commit a multiple homicide, discussed in *Rice v. Paladin*) can be every bit as dangerous as information on how to create such explosives.

6. For purposes of clarification and simplicity, the alternative formulation refers to a "State or local criminal offense affecting interstate commerce," rather than to a "criminal purpose affecting interstate commerce." It is unclear how a "criminal purpose" could "affect" interstate commerce.

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[81] In order to avoid a chilling effect on protected speech, courts might construe such a prohibition as limited to cases where it is reasonably likely that the information will in fact facilitate such criminal conduct. *See supra* at 43 & note 69.

No. 97-1325

(2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

PALADIN ENTERPRISES, INC.,

Petitioner,

vs.

VIVIAN RICE, as guardian and next friend of TAMIELLE HORN, MARILYN FARMER, co-personal representative of the ESTATE OF MILDRED HORN, TIFFANI M. HORN, co-personal representative of the ESTATE OF MILDRED HORN, MICHAEL D. SAUNDERS, individually and next friend of COLIN D. SAUNDERS, a minor, and personal representative of the ESTATE OF JANICE Y. SAUNDERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

1. Whether triable issues of fact exist as to whether defendants, who aid and abet murder by publishing a detailed technical instruction manual on murder-for-hire techniques, may be held responsible in tort to the families of three victims murdered by a professional killer who purchased the defendants' manual and followed its detailed instructions, when the defendants have stipulated that in publishing, marketing, and distributing their manual they intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes, that they intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, and that the defendants' conduct in fact assisted the killer in the perpetration of the murders that are the subject of this litigation, or whether defendants are instead entitled to summary judgment because the First Amendment absolutely precludes the imposition of such liability in these circumstances as a matter of law.

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STATEMENT OF THE CASE

A. Petitioner's Statement of the Case Deliberately Ignores The Fact That It Has *Stipulated* to Every Element of the Crime of Aiding And Abetting Murder.

The Petitioner, Paladin Enterprises, Inc. (hereinafter "Paladin"), published the murder manual *Hit Man: A Technical Manual for Independent Contractors*. Paladin stipulated that it marketed this manual to attract and assist criminals. It stipulated that it knew and intended that the manual would be used, upon receipt, by real murderers to plan and execute killings. It stipulated that its conduct in fact assisted a professional killer to commit three murders:

> . . . . 4. Defendants concede, for purposes of this motion, and for no other purposes, that:
>
> a. defendants engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes; and
>
> b. in publishing, marketing, advertising and distributing *Hit Man* and *Silencers*, defendants intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications. . . .
>
> 7. Defendants concede, for the purpose of this motion and for no other purposes, that in publishing, distributing and selling *Hit Man* and *Silencers* to Perry, defendants assisted him in the subsequent perpetration of the murders which are the subject of this litigation . . . .

App. 16a-18a n.2.

These stipulations are sufficient, as a matter of law, to constitute aiding and abetting murder. App. 36a-38a; *Apostoledes v. State*, 323 Md. 456, 593 A.2d 1118, 1121 (1991); *Anello v. State*, 201 Md. 164, 93 A.2d 71, 72-73 (Md. 1952).

In the face of these extraordinary stipulations, Paladin moved for summary judgment, claiming absolute protection from liability under

the First Amendment. Even if the most egregious behavior on the part of Paladin was assumed, it argued, the First Amendment still protected it, for a publisher cannot be held responsible for providing instructions used to commit murder even when it knows and intends that those instructions will be used to kill. When distilled to its essential core, Paladin's argument is that the First Amendment is a license to aid and abet murder. This radical construction of the First Amendment was properly repudiated by the Court of Appeals, and there is no warrant for this Court to disturb that judgment. Paladin's strategic choice to file its Motion for Summary Judgment was a gamble which it lost. Having lost, it must now litigate. This case should proceed to trial.

Whether review of the issues presented in this litigation will ever be appropriate in this Court, it certainly is not appropriate at this juncture. It is an axiom of this Court's jurisprudence to avoid premature review of constitutional questions. The First Amendment issues presented in the Petition for Certiorari ought not be considered and resolved by this Court on the basis of a skeletal, stipulated record, devoid of the context that would be provided by discovery and trial, and prior to examination of such a fully-developed factual record by the courts below. The sound management of this Court's scarce time and resources, as well as the wisdom of eschewing review of constitutional issues prior to their illumination through the development of a full factual record, are sufficient grounds alone to deny the writ at this time.

B. The Decision Below Does Not Conflict With The Law of Other Circuits.

The Court of Appeals exhaustively canvassed the decisional law of all other federal circuits that have examined issues analogous to those presented in this suit. As the Court aptly observed,

> *every* court that has addressed the issue, including this court, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.

App. 22a.

C. The Decision Below Does Not Conflict with *Brandenburg v. Ohio*.

The decision below does not conflict with *Brandenburg v. Ohio*, 394 U.S. 705 (1969). The opinion of the Court of Appeals distinguished

Brandenburg on two separate grounds, each of which stands as an adequate and independent basis for denying the writ. First, the Court of Appeals, following the consistent and uniform holdings of every other circuit that has addressed the question, held that *Brandenburg* does not insulate a defendant from liability when the defendant's speech goes beyond the bounds of abstract advocacy and into the realm of providing specific instruction that aids and abets another in the commission of a criminal offense. App. 23a-24a. The Court of Appeals applied *Brandenburg* conscientiously and correctly, drawing the sound distinction between mere "abstract teaching" and more concrete preparation and instruction to aid and abet crime. This was exactly the distinction drawn by *Brandenburg* itself, in which this Court admonished that " 'the mere abstract teaching . . . of the moral propriety or even moral necessity of a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' " 395 U.S. at 448, *quoting Noto v. United States*, 367 U.S. 290, 297-98 (1961).

As a second and alternative basis for its ruling, the Court of Appeals held that even on its terms, the *Brandenburg* formulation did not warrant granting Paladin judgment as a matter of law. App. 64a, n.11. The Court properly held that at the very least, the Respondents were entitled to a jury trial under the *Brandenburg* standard, reasoning that the extraordinary stipulations entered into by Paladin, stipulations the Court characterized as "astonishing," App. 71a, were sufficient to avoid summary judgment under *Brandenburg*. Perhaps more importantly, the Court of Appeals, conscientiously exercising its obligation to engage in "independent appellate review" of the First Amendment standard as applied to the text of *Hit Man,* painstakingly dissected the manual, concluding that considering the almost unique nature of these facts, the First Amendment does not, and should not, bar the imposition of civil liability in this case. App. 71a.

D. The Decision Below Does Not Conflict With The Principles of *The Florida Star v. B.J.F.* or *Smith v. Daily Mail Publishing Co.*

The decision below does not conflict with this Court's decisions in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). In *Florida Star,* this Court

rejected the imposition of liability for the inadvertent publication of the name of a rape victim, and in *Daily Mail,* the Court struck down an indictment of two newspapers for violating a state statute forbidding the publication of the names of juvenile offenders without the written approval of the juvenile court. These cases merely recite the broad truism that "if a newspaper lawfully obtains truthful information about a matter of public significance, the state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star*, 491 U.S. at 533, *quoting Daily Mail*, 431 U.S. at 103.

Contrary to Paladin's suggestions, which are raised for the first time in their Petition, in both cases this Court *rejected* the sweeping position that the First Amendment absolutely bars the imposition of liability for the publication of truthful information lawfully obtained, instead holding that liability must be justified by the vindication of state interests of the "highest order." Indeed, in *Florida Star* this Court actually acknowledged that protection of the identity of rape victims *did* constitute an interest of the highest order — but the Court found numerous constitutional flaws in Florida's regime, such as its singling out of the media for special treatment, and the lack of any restraining requirements of culpability or intent. In contrast, liability in this case is predicated on a law of general applicability — the doctrines of criminal and tortious aiding and abetting.

The information at issue is not the identity of participants in judicial proceedings, but specific instruction and encouragement intended to be used to assist in aiding and abetting crime. Imposing tort liability for those who knowingly and intentionally traffic in the aiding and abetting of murder is clearly an interest of the highest order, and nothing in *Florida Star* or *Daily Mail* stands as a barrier to such liability.

E. The Decision Below Presents No Issues of Extraordinary Importance.

The Petition for Certiorari makes it sound as if the sky will fall if the decision of the Court of Appeals is allowed to stand without immediate review by this Court. The grave constitutional evil supposedly posed by the Court of Appeals decision is that Paladin will now be forced to litigate, before a trier-of-fact, the issue of whether it actually

possessed the intent to which it stipulated for the purposes of its Motion for Summary Judgment. The position is untenable. The gist of Paladin's Motion for Summary Judgment was the legal argument that *even if* it possessed the intent to which it stipulated — an intent also brazenly manifest on the pages of *Hit Man* itself — it was nonetheless immune from liability as a matter of law. If its legal position fails — if the First Amendment does not absolutely bar liability under such predicate circumstances—than *of course* it follows that Paladin must now bear the burdens of litigation. As this Court established in *Herbert v. Lando*, 441 U.S. 153 (1979), in the aftermath of its creation of the "knowing or reckless falsehood" standard for libel of public figures in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), defendants enjoy no special First Amendment immunity precluding inquiry into their subjective intent, when that subjective intent is an element of the very substantive First Amendment standard that protects them.

Paladin argues that under the rule announced by the Court of Appeals every manner of expression may now be hailed into court on the question of the publisher's intent, from the thriller novels of Tom Clancy, to network news reports on terrorist bombings. This is patently untrue. Paladin published an instruction manual intended to train killers, not a novel intended to entertain, or a news report intended to inform. This is indeed a case "unique in the law," as the Court of Appeals observed, App. 71a, precisely because of Paladin's stunning conduct. There is simply *no* credible threat to other publications posed by the standard employed by the Court of Appeals, because there is no credible likelihood that those publications could *ever* be found to possess the intent to which Paladin has stipulated. As the Court of Appeals emphasized,

> not only will a political, informational, educational, entertainment, or other wholly legitimate purpose for the description or depiction be demonstrably apparent; but the description or depiction of the criminality will be of such a character that an inference of impermissible intent on the part of the producer or publisher would be unwarranted as a matter of law.

App. 69a.

Paladin attempts to avoid the thrust of this entirely dispositive argument by arguing that *Hit Man* is ambiguous in its intent. Paladin constantly makes light of its manual, treating it as a comedy or farce. This refrain is, at best, jury argument. The Court of Appeals, obviously frustrated by the extravagance of this point, used even stronger words:

> After carefully and repeatedly reading *Hit Man* in its entirety, we are of the view that the book so overtly promotes murder in concrete, nonabstract terms that we regard as disturbingly disingenuous both Paladin's cavalier suggestion that the book is essentially a comic book whose "fantastical" promotion of murder no one could take seriously, and amici's reckless characterization of the book as "almost avuncular."

App. 42a.

In sum, the shrill tone of panic that permeates the Petition for Certiorari ought not distract this Court from accepting the Court of Appeals patient and meticulous review of *Hit Man*, a review that overwhelming established the Respondent's entitlement to a jury trial:

> The unique text of *Hit Man* alone, boldly proselytizing and glamorizing the crime of murder and the "profession" of murder as it dispassionately instructs on its commission, is more than sufficient to create a triable issue of fact as to Paladin's intent in publishing and selling the manual.

App. 42a.

REASONS FOR DENYING THE WRIT

I. REVIEW BY THIS COURT IS NOT APPROPRIATE AT THIS JUNCTURE, PRIOR TO FULL DEVELOPMENT OF A FACTUAL RECORD AT TRIAL.

Paladin has stipulated to the elements of aiding and abetting murder.[1] *See* App. 36a-38a; *Apostoledes v. State*, 323 Md. 456, 593 A.2d 1118, 1121 (1991); *Anello v. State*, 201 Md. 164, 93 A.2d 71, 72-73 (1952).

1. In its artfully sanitized paraphrasing of the Joint Statement of Facts, Paladin understandably attempts to soft-pedal the full force of its stipulations. The full text of the Joint Statement of Facts was not offered by Petitioners, although it is contained in the Opinion below. App. 16a-18a.

The Court of Appeals merely held that, given Paladin's astonishing stipulations, and the unique character and content of the murder instruction manual, *Hit Man*, triable issues of fact were presented as to whether Paladin may be held responsible in tort to the families of three victims murdered by a professional killer who purchased Paladin's manual and followed its detailed instructions.

Paladin made a strategic litigation choice. Rather than proceed to discovery and trial, Paladin conceded the worst, admitting, for the purposes of presenting its Motion for Summary Judgment, that in publishing, marketing, and distributing its murder instruction manual, it intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes, that it intended and had knowledge that its murder manual would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, and that its conduct in fact assisted the killer in the perpetration of the terrible murders that gave rise to this suit. Paladin thus engaged in the calculated gamble that it could prevail even in the face of these extreme stipulations. Having lost that gamble, it must now proceed to trial.

Whether review of the issues presented in this litigation will ever be appropriate in this Court, it certainly is not appropriate at this juncture. As Justice Brandeis admonished in his famous restatement of this Court's prudential rules of restraint, the "Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (internal cite omitted). This Court has constantly heeded Justice Brandeis' restraining wisdom, notwithstanding "the availability of thoroughly prepared attorneys to argue both sides of a constitutional question, and of numerous amici curiae ready to assist in the decisional process, even though all of them 'stand like greyhounds in the slips, straining upon the start.' " *Kremens v. Bartley*, 431 U.S. 119, 133-34 n.15 (1977).

Incredibly, in its Petition for Certiorari, Paladin actually maintains that the decision of the parties to submit a joint statement of facts for the purposes of the Motion for Summary Judgment is a factor *favoring* immediate review by this Court. This is backwards. That Paladin chose

to move for summary judgment on the basis of the radical stipulations and extraordinary legal positions it has advanced certainly does not impress upon this Court any obligation to prematurely review constitutional questions that it would otherwise prudentially avoid. Nor does it matter that Paladin's defense is based on the First Amendment. This Court routinely denies petitions in First Amendment litigation even after full trials, let alone after mere denial of a Motion for Summary Judgment.

The First Amendment questions presented in the Petition for Certiorari ought not be considered and resolved by this Court on the basis of a skeletal, stipulated record, devoid of the context that would be provided by discovery and trial, and prior to examination of such a fully-developed factual record by the courts below. *See Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622, 667 (1994) ("Because of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions."). Recognizing the doctrinal complexity and important role of factual context in First Amendment adjudication, this Court has been especially cautious about reaching out unnecessarily to decide free speech issues before it must, or on grounds broader than required to dispose of a case before it. *See Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*, 116 S. Ct. 2374, 2384-85 (1996). The sound management of this Court's scarce time and resources, as well as the wisdom of eschewing review of constitutional issues prior to their illumination through the development of a full factual record, are sufficient grounds standing alone to deny the writ at this time.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE LAW OF OTHER CIRCUITS.

The Court of Appeals found utterly unpersuasive the arguments of Paladin below that law from other federal circuits and state jurisdictions supports the radical interpretation of the First Amendment Paladin has

advanced in this litigation. After exhaustively canvassing that decisional law the Court of Appeals correctly observed that

> *every* court that has addressed the issue, including this court, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.

App. 22a.[2]

As then-Judge Kennedy, writing for the Ninth Circuit in *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986), explained, "[i]n those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone." *Id.* at 552 (citations omitted).[3] *See also United States v. Barnett*, 667 F.2d 835, 843 (9th

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2. The accuracy of the Court of Appeals' reading of the law of other circuits was reinforced by a report on the issues pertinent to this litigation issued by the Department of Justice on the eve of oral argument below. *See* Department of Justice, Report on the Availability of Bombmaking Information, the Extent to Which Its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution (April 1997) [hereinafter "DOJ Report"] ("But the tax-avoidance aiding and abetting cases are not subject to *Brandenburg* because culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing crimes.") App. 197a-199a.

3. Paladin's attempt to spin a circuit conflict out of *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984) is entirely unpersuasive. In *Dahlstrom* the government attempted to prosecute the defendants for doing nothing more than promoting and publishing a *legal* tax shelter program. It was in this context, in which the tax shelter provisions were legal, that the court held that no liability could be imposed unless the government satisfied the *Brandenburg* test, and that nothing in the record before it satisfied that test. *Id.* at 1428. Unlike *Dahlstrom*, the "how to commit murder for hire" transactions described in *Hit Man* are patently and manifestly illegal. And unlike *Dahlstrom*, Respondents have at the very least clearly placed in issue triable issues of fact under the *Brandenburg* standard. Indeed,

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Cir. 1982) (holding that the First Amendment does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs, rejecting as a "specious syllogism" with "no support in the law" the publisher's argument that there could be no probable cause to believe that a crime had been committed because its actions were shielded by the First Amendment, stating that "To the extent . . . that *Barnett* appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct."); *United States v. Buttorff*, 572 F.2d 619, 623-24 (8th Cir. 1978), *cert. denied*, 437 U.S. 906 (1978) (sustaining convictions for aiding and abetting the filing of false or fraudulent tax returns against defendants who spoke at large public meetings where they offered detailed instructions on how to illegally avoid paying taxes and frustrate the administration of the Internal Revenue Service, stating: "Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting, the filing of false or fraudulent withholding forms."); *United States v. Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding *Brandenburg* inapplicable to a conviction for conspiring to transport and aiding and abetting where defendants disseminated a computer program that assisted others to record and analyze bets on sporting events, on grounds that the program was "too instrumental in and intertwined with the performance of criminal activity

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Dahlstrom was distinguished on precisely these grounds by then-Judge Kennedy in *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985), which found *Dahlstrom* not controlling because the transactions proposed in that case were not clearly illegal, while the illegality of the transactions in *Freeman* were "manifest."

to retain first amendment protection"); *United States v. Rowlee*, 899 F.2d 1275, 1279 (2d Cir. 1990), *cert. denied*, 498 U.S. 828 (1990) (rejecting First Amendment defense to aiding and abetting convictions in case involving "step-by-step instructions on how to prevent employers from withholding both state and federal income taxes," noting that the consensus of every federal Court of Appeals was that liability for a false or fraudulent tax return cannot be avoided by invoking the First Amendment and stating, "we think it would have made for a simpler and cleaner case if the district court had not referred to the First Amendment at all" because "[t]o the extent that the concept of 'imminent lawless action' has any role to play in this non-syndicalism case" that concept was already incorporated in the criminal statute); *National Organization for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) ("[t]hat 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality."); *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980) (holding that the First Amendment did not protect defendant's speech which the challenged constitutionality of federal income tax laws and described how to avoid the federal withholding tax); *United States v. Fleschner*, 98 F.3d 155, 158-59 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2484 (1997) (holding that defendants who instructed and advised meeting attendees to file unlawful tax returns were not entitled to a First Amendment jury instruction on the charge of conspiracy to defraud the United States of income tax revenue because "[t]he defendants' words and acts were not remote from the commission of the criminal acts."); *United States v. Kelley*, 769 F.2d 215 (4th Cir. 1985) (same); *United States v. Daly*, 756 F.2d 1076, 1081-82 (5th Cir. 1985) (sustaining conviction for conspiracy to defraud the United States based on dissemination of information to members of church on how to file tax returns in a manner calculated to hamper Internal Revenue Service investigation, noting that the defendant "claims that his advocacy of a tax scheme, whether legal or illegal, is protected by the First Amendment, because it did not incite imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This claim is preposterous."); *United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir.), *cert. denied*, 409 U.S. 991 (1972) (rejecting First Amendment challenge to federal statute criminalizing the teaching or demonstration of the making of any

explosive device, 18 U.S.C. § 232(1), after construing statute to require "intent or knowledge that the information disseminated would be used in the furtherance of a civil disorder"); *National Mobilization Committee to End the War in Viet Nam v. Foran*, 411 F.2d 934, 937 (7th Cir. 1969) (similarly rejecting First Amendment challenge to 18 U.S.C. § 232(1), stating that the requirement of intent "narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription."); *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993) (sustaining a wrongful death cause of action against *Soldier of Fortune Magazine* arising from a "gun for hire" advertisement); *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 48, 123 Cal. Rptr. 468, 472, 539 P.2d 36, 40 (1975) (sustaining an action for wrongful death when the decedent's automobile was negligently forced off a highway by a listener to the defendant's radio station, which was conducting a contest rewarding the first contestant to locate a disc jockey traveling throughout the listening area, rejecting the station's asserted First Amendment defense, holding that "[d]efendants' contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to descendent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.")[4]

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4. Paladin's attempt to conjure a conflict with the Fifth Circuit through their citation to *High Ol' Times, Inc. v. Busbee*, 621 F.2d 141 (5th Cir. 1980), *aff'g*, 456 F. Supp. 1035 (N.D. Ga. 1978), does not wash. In *Busbee*, the Fifth Circuit summarily affirmed a District Court opinion striking down a Georgia "head shop" law that, in part, made it illegal to publish information regarding illegal drug usage. The District Court stated in *Busbee* that "printed matter either assailing the state's controlled substances laws or extolling the attractions of certain unlawful substances and glorifying the drug culture may not be generally restricted." 465 F. Supp. at 1040. *Busbee* stands as no impediment to the imposition of liability for specific training intended to facilitate criminal acts, as the Fifth Circuit has elsewhere confirmed. *See United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir.), *cert. denied*, 409 U.S. 991 (1972) (rejecting First Amendment challenge to federal statute criminalizing the teaching or demonstration of the making of any explosive device where there is intent or knowledge that the information disseminated

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Paladin attempts to manufacture conflict where none exists by pretending that the so-called "copycat cases," upon which it has heavily relied from the onset of this litigation, are inconsistent with the decision below. In these copycat cases, material presented for artistic, entertainment, or educational purposes depicts activity that is dangerous or violent. A person exposed to the depiction, often a child, engages in behavior emulating the dangerous activity, resulting in injury or death. Courts confronted with tort claims arising in these circumstances routinely reject the imposition of liability.

As the Court of Appeals correctly observed, these copycat cases are not analogous to the present litigation, in which Paladin marketed a detailed murder instruction manual knowing and intending that it would be used to aid and abet murder:

> In the "copycat" context, it will presumably never be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-a-vis the use intended, not, as here, used precisely as intended. . . . And, perhaps most importantly, there will almost never be evidence proffered from which a jury even could reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity.

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would be used in the furtherance of a civil disorder); *United States v. Daly*, 756 F.2d 1076, 1081-82 (5th Cir. 1985) (affirming conviction for conspiracy to defraud the United States based on dissemination of information on how to file tax returns in a manner that would interfere with Internal Revenue Service investigation). *See also Shackelford v. Shirley*, 948 F.2d 945, 551 (5th Cir. 1991) ("As speech strays further from the values of persuasion, dialogue and free exchange of ideas the first amendment was designed to protect, and moves toward threats made with specific intent to perform illegal acts, the state has greater latitude to enact statutes that effectively neutralize verbal expression."). Note also that this Court in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) upheld a "headshop" law, holding tend to trafficking in solicitations for illegal activity.

App. 68a. This entirely distinguishes cases such as *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (1987), *cert. denied*, 485 U.S. 959 (1988), in which the publisher clearly does not intend that the depiction will be emulated. *Id.* at 1024 ("the explicit meaning of the words employed, attempts to *dissuade* its readers from conducting the dangerous activity it describes.") (Emphasis added). Indeed, the Court of Appeals was stunned by the outlandish claim of Paladin and its *amici* on this point:

> That the national media organizations would feel obliged to vigorously defend Paladin's assertion of a constitutional right to intentionally and knowingly assist murderers with technical information which Paladin admits it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking.

App. 67a. Paladin's "breathtaking" arguments deserve no better response from this Court.

III. THE DECISION BELOW DOES NOT CONFLICT WITH *BRANDENBURG v. OHIO*.

The decision below does not conflict with *Brandenburg v. Ohio*, 394 U.S. 705 (1969), in which this Court stated that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action.

Id. at 47. The opinion of the Court of Appeals distinguished *Brandenburg* on two separate grounds, each of which stands as an adequate and independent basis for denying the writ. First, the Court of Appeals, following the consistent and uniform holdings of every other circuit that has addressed the question, held that *Brandenburg* does not insulate a defendant from liability when the defendant's speech goes beyond the bounds of abstract advocacy and into the realm of providing specific instruction that aids and abets another in the commission of a criminal offense. App. 23a-24a. The Court of Appeals applied *Brandenburg* conscientiously and correctly, drawing

the sound distinction between mere "abstract teaching" and more concrete preparation and instruction to aid and abet crime.

Contrary to Paladin's assertions, the Court of Appeals decidedly did *not* denigrate or diminish the importance of *Brandenburg* in First Amendment jurisprudence, and did not cavalierly regard itself as "unencumbered" by *Brandenburg* or the subsequent decisions of this Court. Paladin has unfairly caricatured the analysis of the Court of Appeals, an analysis grounded in a dichotomy well-entrenched in First Amendment law, between "abstract advocacy" and detailed preparation and instruction intended to assist others in the commission of crime. Indeed, this Court drew precisely this distinction in *Brandenburg* itself, emphasizing that " 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' " 395 U.S. at 448, *quoting Noto v. United States*, 367 U.S. 290, 297-98 (1961).

The Court of Appeals did not give *Brandenburg* a narrow construction but a generous one. The emphasis of the Court of Appeals was not merely on what *Hit Man* does *not* contain but on what it *does* contain. *Hit Man* cannot embrace any plausible claim to being mere "abstract teaching" of the "moral propriety" of murder. As the Court of Appeals accurately recognized, it is precisely what it claims to be, a "technical manual" published "*for*" the "independent contractor." It is steeped in detailed step-by-step instruction, including engineering specifications, photographs, diagrams, charts, sample maps, checklists, formulas, suggested prices, information on selection of weapons, methods for altering weapons and ammunition, killing techniques, travel arrangements, instructions on appropriate garb, money-laundering methods — *all* the protocols, particulars and minutia of contract murder from A to Z, punctuated page-by-page with exhortation and encouragement intended to prepare and steel the criminal for action.[5]

5. In the words of Judge Learned Hand:

> One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a

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Imagine that in *Brandenburg* itself the record had demonstrated that the leaders of the Ku Klux Klan rally did more than burn crosses and spout racist venom, but actually distributed material such as maps, diagrams, chemical formulas for bombs, travel arrangements, instruction on weapons selection, and specific killing techniques, thus crossing the line from mere abstract advocacy to specific training and preparation. And imagine that following those instructions, Klan members went out and committed murder, using the techniques distributed at the rally. And imagine that the Klan leaders *stipulated* that in distributing their material, they *knew and intended* that the information would be used to kill. And imagine that the Klan leaders were convicted not under a broadly-worded "criminal syndicalism" law, but for intentionally aiding and abetting murder. In those circumstances it is inconceivable that this Court would have reversed the convictions as beyond the pale of the First Amendment. To the contrary, this Court would surely have cited holdings such as *Noto v. United States*, 367 U.S. 290 (1961), labeling such conduct as "preparing a group for violent action and steeling it to such action." *Id.* at 297-98.

The Court of Appeals properly recognized the great purpose of the standard articulated in *Brandenburg*, eloquently explaining that the "right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty." App. 19a. The point of *Brandenburg* is to place even advocacy of violence, revolution, and murder within the ambit of the free speech principle. As the Court of Appeals stated:

> Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.

App. 19a.

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> part of that public opinion which is the final source of government in a democratic state.

Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd on other grounds*, 246 F.2d (2d Cir. 1917).

What the Court of Appeals also recognized, however, is that the *Brandenburg* standard was never designed to insulate from liability the communication of detailed information intended to facilitate crime. There is no abstract advocacy in the detailed how-to instructions contained in *Hit Man*. Unlike the many decisions of this Court that comprise the *Brandenburg* line of precedent — all of which involved political or social discourse of some kind — the communication at issue here is nothing more than detailed factual information on how to go into business as a paid assassin and carry out executions. The long train of rulings of this Court dealing with such issues as advocacy of violence, incitement, symbolic speech, and graphic protest have *all* involved speech pertaining to political or social issues. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47 (1919) (World War I protest); *Abrams v. United States*, 250 U.S. 616 (1919) (World War I protest); *Whitney v. California*, 274 U.S. 357 (1927) (communist labor party convention); *Herndon v. Lowry*, 301 U.S. 242 (1937) (civil rights/communist party materials); *Dennis v. United States*, 341 U.S. 494 (1951) (communist party materials); *Bond v. Floyd*, 385 U.S. 116 (1966) (Vietnam protest); *Hess v. Indiana*, 414 U.S. 105 (1973) (Vietnam protest); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil rights boycott); *Cohen v. California*, 403 U.S. 15 (1971) (vulgar anti-draft message); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning to protest Republican Party policies). The speech in *Hit Man* simply does not fit within this list.[6] *Hit Man* is not political manifesto, not revolutionary diatribe, not propaganda or protest, nor an outpouring of conscience or credo. It is *instruction*, pure and simple, in the dark arts of mercenary murder.[7]

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6. Indeed, *Brandenburg* and its progeny speak to the problem of inciting crowds to lawless activity, a set of concerns inapplicable and irrelevant to the deliberate planning and execution of a criminal act to occur in the future such as presented here.

7. The submission of Paladin, that the decision below is inconsistent with holdings such as *Hess v. Indiana*, 414 U.S. 105 (1973) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) is thus plainly wrong. In *Hess* the Court held that a statement made in the midst of a anti-Vietnam War protest on the University of Indiana campus that "We'll take the . . . street later" was protected under *Brandenburg*. In *Claiborne* the Court similarly held protected a statement made in connection with a civil rights boycott that "If we catch

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This Court has *never* applied *Brandenburg*, or any variant of the clear and present danger test, to insulate an actor from liability when that actor supplied detailed, specific training or instruction used to aid and abet crime. As previously demonstrated, the myriad lower court opinions that have examined and applied this dichotomy have all reached the same conclusion as the Court of Appeals below, holding that in such instances the First Amendment provides no shelter from liability.[8]

The bedrock principle animating the First Amendment is that the government may not censor speech on the basis of viewpoint. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). The decision of the Court of Appeals, however, indulges no viewpoint-discrimination. The remand for trial does not invite a jury to punish Paladin because its speech is revolting, disgusting, or morally repugnant. This is not an offensive speech case; nor an advocacy of unpopular ideas case. This is a case about tort liability for aiding and abetting murder. The gravamen of the cause of action is not a reader's intellectual or emotional disgust at the evil of Paladin's publication. This suit is not about taking sides in the marketplace of ideas; indeed, it is not about *ideas* at all. This suit is about recompense for physical violence and death assisted by Paladin's publication of an instruction manual for murder, a manual that was used in this case precisely as the words in the manual instructed that it be used.[9]

The distinction relied upon by the Court of Appeals has long been central to First Amendment jurisprudence. In *Scales v. United States*, 367 U.S. 203, 233 (1961), for example, this Court meticulously

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any of you going in any of them racist stores, we're gonna break your damn neck." Both cases thus involved hyperbolic threats of future illegal action made in the midst of political and social protest. They had nothing whatsoever to do with detailed and specific training and instruction in techniques of crime, and are in no way consistent with the holding of the Court of Appeals here.

8. *See* Part II of this Brief in Opposition, examining decisional law in other circuits.

9. *See* Thomas Emerson, *The System of Freedom of Expression* p. 75 (1970) ("[C]onduct that amounts to 'advice' or 'persuasion' [sh]ould be protected; conduct that moves into the area of 'instructions' or 'preparations' [sh]ould not.").

distinguished between the teaching of abstract doctrine and the teaching of the *techniques* of criminal conduct. ("Here again, the participants did not stop with teaching of the inevitability of eventual revolution, but went on to explain techniques, both legal and illegal, to be employed in preparation for or in connection with the revolution.") *Scales* thus stated that the "teaching" of the forceful overthrow of the government may be constitutionally proscribed when "accompanied by directions as to the type of illegal action which must be taken when the time for the revolution is reached." *Id. See also Yates v. United States*, 354 U.S. 298, 331-33 (1957) (repeatedly emphasizing that convictions could not be sustained on basis of mere "advocacy of violence as a theoretical matter" but acknowledging that conduct could be punished if the "teaching was to prepare the members of the underground apparatus to engage in, to facilitate, and to cooperate with violent action directed against government when the time was ripe.") This distinction between teaching theory and teaching technique was similarly emphasized by Justice Douglas in *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting), in which he observed that

> [i]f this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale.

If the principle were otherwise, government would be paralyzed, for a large part of criminal and tortious activity is executed through the use of language, and "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed" *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978), *quoting Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also* Kent Greenawalt, *Speech, Crime and the Uses of Language* p. 85 (1989) ("The reasons of ordinary penal policy for covering communicative efforts to carry out ordinary crimes are obvious, and the criminal law

sensibly draws no distinction between communicative and other acts. Although assertions of fact generally fall within a principle of freedom of speech, what these sorts of factual statements contribute to the general understanding of listeners is minimal, and the state justifications for free speech that apply to speakers do not reach communications that are simply means to get a crime successfully committed."); Laurence H. Tribe, *American Constitutional Law* p. 837 (2d ed. 1988) ("And the law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of old Volkswagen parts.")[10]

As a second and alternative basis for its ruling, the Court of Appeals

10. As this Court explained in *Brown v. Hartlage*, 456 U.S. 45 (1982):

> Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech. Finally, while a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may be properly be prohibited.

Id. at 55, *citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388 (1973). *See also Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence"); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); *Watts v. United States*, 394 U.S. 705 (1969) (*per curiam*) (holding facially constitutional federal statute prohibiting making threats to take the life or inflict bodily harm on the President of the United States).

held that even on its terms, the *Brandenburg* formulation did not warrant granting Paladin judgment as a matter of law. App. 64a, n.11. The Court properly held that at the very least, the Respondents may be entitled to a jury trial under the *Brandenburg* standard, reasoning that the extraordinary stipulations entered into by Paladin were sufficient to avoid summary judgment under *Brandenburg*.

Inexplicably, Paladin complains that it was improper for the Court of Appeals to place any credence on its stipulated *subjective* intent unless the text of *Hit Man* satisfies the *objective* requirements of *Brandenburg*. This is certainly not the law. In the First Amendment area, as in other fields of constitutional law, subjective intent is often dispositive. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (establishing actual malice standard in public official libel cases, requiring knowledge of falsity or reckless disregard for truth or falsity as a predicate to liability); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (holding that the First Amendment does not bar the evidentiary use of speech to establish illegal intent.).

Be that as it may, it is doubtful that there are many reported cases in which a court has so thoroughly canvassed a text and so scrupulously demonstrated how it satisfies the objective legal standard under review. The Court of Appeals, conscientiously exercising its obligation to engage in careful independent review of the First Amendment standard as applied to the *Hit Man* text, *see Bose Corp v. Consumers Union of United States*, 466 U.S. 485 (1984), painstakingly dissected the manual, chapter-by-chapter, page-by-page. Summarizing that prodigious effort, the Court concluded:

> Paladin's astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man*'s instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law. In at least these circumstances, we are confident that the First Amendment

> does not erect the absolute bar to the imposition of civil liability for which Paladin Press and amici contend.

App. 71a.

This analysis of the Court of Appeals was entirely appropriate and thoroughly convincing.[11] App. 16a.

IV. THE DECISION BELOW DOES NOT CONFLICT WITH THE PRINCIPLES OF *THE FLORIDA STAR v. B.J.F.* OR *SMITH v. DAILY MAIL PUBLISHING COMPANY.*

The decision below does not conflict with this Court's decisions in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). In *Florida Star* this Court rejected the imposition of liability for the inadvertent publication of the name of a rape victim, and in *Daily Mail* the Court struck down an indictment of two newspapers for violating a state statute forbidding the publication of the names of juvenile offenders without the written approval of the juvenile court. These cases merely recite the broad truism that "if a newspaper lawfully obtains truthful information about a matter of public significance, the state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star*, 491 U.S. at 533, *quoting Daily Mail*, 431 U.S. at 103.

Contrary to Paladin's suggestions, in these cases this Court *rejected* the sweeping position that the First Amendment absolutely bars the imposition of liability for the publication of truthful information lawfully obtained, instead holding that liability must be justified by the vindication of state interests of the "highest order." *Florida Star*, 491 U.S. at 532 ("Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which

11. *See* DOJ Report at 30 & n.47 (citations omitted) ("Therefore, insofar as criminal culpability for dissemination of such information depends upon the distributors' intent—for example, upon whether a disseminator of bombmaking manuals had the conscious purpose of helping others to use the information to engage in unlawful conduct — the substance of the advocacy in such manuals could be used as material evidence of such intent."). App. 186a.

prudence counsels our not resolving anticipatorily.") Indeed, in *Florida Star* this Court actually acknowledged that protection of the identity of rape victims *did* constitute an interest of the highest order, *id.* at 537. The Court nonetheless found numerous constitutional flaws in Florida's regime, such as its singling out of the media for special treatment, and the lack of any restraining requirements of culpability or intent. *id.* at 538-40.

In contrast, the decision below predicates liability on a law of general applicability — the doctrines of criminal and tortious aiding and abetting. In *Cohen v. Cowles Media Company*, 501 U.S. 663 (1991), this Court refused to engraft a First Amendment defense unto a promissory estoppel claim brought against a newspaper that violated a promise of confidentiality it had granted to a source, stating that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669.[12] The "truthful information" in *Hit Man* is not the identity of participants in judicial proceedings, but specific instruction and encouragement intended to be used to assist in aiding and abetting crime.[13]

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12. *See also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (explaining that generally applicable tax laws may be applied against the press, while those that single it out for specially disadvantageous treatment may not); *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990) (sustaining generally applicable sales tax even as applied to religious books and merchandise); *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (sustaining application of antitrust laws to the press); *Associated Press v. United States*, 326 U.S. 1 (1945) (same); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (sustaining application of National Labor Relations Act to the press); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (sustaining application of Fair Labor Standards Act to the press).

13. Thus, while the information in *Hit Man* is arguably in some sense "truthful," it is also information detailing activity that is thoroughly unlawful. This Court has frequently held, in the commercial speech context, that speech proposing illegal transactions is entitled to no First Amendment protection. *See Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 496 (1982) ("The ordinance is expressly directed a commercial activity

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Imposing tort liability for those who knowingly and intentionally traffic in the aiding and abetting of murder is clearly an interest of the highest order, and nothing in *Florida Star* or *Daily Mail* stands as a barrier to such liability. Indeed, prior decisions of this Court demonstrate that liability frequently stems from the publication of truthful information when publication of that information infringes another's legally cognizable interests. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (First Amendment no bar to imposition of liability for invasion of common-law right of publicity); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 524 (1985) (First Amendment no bar to liability for copyright infringement in case arising from publication of presidential memoirs); *Snepp v. United States*, 444 U.S. 507 (1980) (First Amendment no bar to imposition of constructive trust on royalties from publication of mass market book published by former Central Intelligence Agency agent disclosing material not cleared by Central Intelligence Agency as required by preclearance agreement.)

V. THE DECISION BELOW PRESENTS NO ISSUES OF EXTRAORDINARY IMPORTANCE.

Contrary to the shrill alarms sounded in the Petition for Certiorari, the sky will not fall on public discourse if the decision of the Court of Appeals is allowed to stand without immediate review by this Court. The grave constitutional evil supposedly posed by the Court of Appeals decision is that the Paladin will now be forced to litigate, before a trier-of-fact, the issue of whether it actually possessed the intent to which it stipulated for the purposes of its Motion for Summary Judgment.

The position is utterly untenable. The gist of Paladin's Motion for Summary Judgment was the legal argument that *even if* it possessed the intent to which it stipulated — an intent also brazenly manifest on the pages of *Hit Man* itself — it was nonetheless immune from liability as a matter of law. If Paladin's legal position fails — if the First Amendment does not absolutely bar liability under such predicate circumstances —

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promoting or encouraging illegal drug use. If that activity is deemed 'speech,' then it is speech proposing an illegal transaction, which a government may regulate or ban entirely."). *See also Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388 (1973).

than *of course* it follows that Paladin must now bear the burdens of litigation, including the burden of inquiry into its subjective intent.

In *Herbert v. Lando*, 441 U.S. 153 (1979), a libel suit involving the CBS program *60 Minutes*, the defendants argued that the First Amendment precluded inquiry into the subjective state of mind of the program's journalists and producers, on the theory that this inquiry into editorial processes would itself chill the exercise of First Amendment freedoms. This Court rejected the argument, noting that subjective state of mind was an integral element of the First Amendment standard in public official libel cases created by the "knowing or reckless falsehood" test of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This Court observed that

> Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages. The rules are applicable to the press and to other defendants alike, and it is evident that the courts across the country have long been accepting evidence going to the editorial processes of the media without encountering constitutional objections.

Herbert v. Lando, 441 U.S at 164.

Yet Paladin maintains that under the rule announced by the Court of Appeals every manner of expression may now be hailed into court on the question of the publishers' intent, from the thriller novels of Tom Clancy to network news reports on terrorist bombings. This is patently untrue. Paladin published a murder manual intended to train killers, not a novel intended to entertain, or a news report intended to inform. This is indeed a case "unique in the law," as the Court of Appeals observed, App. 71a, precisely because of the Paladin's stunning conduct, as evidenced on this record both by its extraordinary stipulations and by the brazen text of *Hit Man* itself. *See* App. 62-63a ("There is nothing even arguably tentative or recondite in the book's promotion of, and instruction in, murder."). Paladin has stipulated its bed, and it must lie in it.

There is simply *no* credible threat to other publications posed by the standard employed by the Court of Appeals, because there is no

credible likelihood that those publications could *ever* be found to posses the intent to which Paladin has stipulated. As the Court of Appeals emphasized,

> not only will a political, informational, educational, entertainment, or other wholly legitimate purpose for the description or depiction be demonstrably apparent; but the description or depiction of the criminality will be of such a character that an inference of impermissible intent on the part of the producer or publisher would be unwarranted as a matter of law.

App. 69a.

It is of course a truism that under the standard announced by the Court of Appeals, suits against novels or movies may be *brought*. But that is true under any legal standard short of absolute immunity. As the Court of Appeals persuasively demonstrated, however, there is virtually zero chance that any such suit may ever be successfully *maintained*. App. 69a. ("So, for example, for almost any broadcast, book, movie, or song that one can imagine, an inference of unlawful motive from the description or depiction of particular criminal conduct therein would almost never be reasonable, for not only will there be (and demonstrably so) a legitimate and lawful purpose for these communications, but the contexts in which the descriptions or depictions appear will themselves negate a purpose on the part of the producer or publisher to others in their undertaking of the described or depicted conduct." *citing Miller v. California*, 413 U.S. 15 (1973).)

Paladin attempts to avoid the thrust of this entirely dispositive argument by arguing that the instruction manual *Hit Man* is ambiguous in its intent. Paladin repeatedly dismisses its own manual as tongue-in-cheek comedy or farce. This refrain rings hollow against the tragic and stark reality of the deaths of three innocent people. At most, it is jury argument. The Court of Appeals, obviously frustrated by the extravagance of this point, used even stronger words:

> After carefully and repeatedly reading *Hit Man* in its entirety, we are of the view that the book so overtly promotes murder in concrete, nonabstract terms that we regard as disturbingly disingenuous both Paladin's

> cavalier suggestion that the book is essentially a comic book whose "fantastical" promotion of murder no one could take seriously, and amici's reckless characterization of the book as "almost avuncular."

App. 42a.

In sum, the cries of panic that permeate the Petition for Certiorari ought not distract this Court, which should accept as eminently sound the Court of Appeals' patient and meticulous review of *Hit Man*, a review that overwhelming established the Respondents' entitlement to a jury trial:

> The unique text of *Hit Man* alone, boldly proselytizing and glamorizing the crime of murder and the "profession" of murder as it dispassionately instructs on its commission, is more than sufficient to create a triable issue of fact as to Paladin's intent in publishing and selling the manual.

App. 42a.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

PALADIN ENTERPRISES, INC.
Petitioner,
v.
VIVIAN RICE, as guardian and next friend of TAMIELLE HORN, MARILYN FARMER, co-personal representative of the ESTATE OF MILDRED HORN, TIFFANI M. HORN, co-personal representative of the ESTATE OF MILDRED HORN, MICHAEL D. SAUNDERS, individually and next friend of COLIN D. SAUNDERS, a minor, and personal representative of the ESTATE OF JANICE Y. SAUNDERS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE HORROR WRITERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE HORROR WRITERS ASSOCIATION AND ITS INTEREST AS AMICUS CURIAE

The Horror Writers Association ("HWA") is a not-for-profit organization whose members are writers, editors, illustrators, filmmakers, publishers, scholars and students of the literature of horror and the supernatural. Its membership constitutes a "who's who" of contemporary entertainment and scholarship, including, among many others, Clive Barker, Janet Berliner (current president), Ramsey Campbell, John Carpenter, Ellen Datlow, Stephen King, Brian Lumley (immediate past president), Richard Matheson, David Morrell, Joyce Carol Oates, Peter Straub (member, Board of Trustees), Lawrence Watt-Evans and Jane Yolen. HWA, like Mystery Writers of America and Science Fiction Writers of America, provides a network of assistance and support for its diverse, primarily self-employed membership, offering instructional programs, alternative dispute resolution, insurance coverage and a hardship fund; it also administers the annual Bram Stoker Awards for achievement in the field.

The HWA participates here as amicus curiae because the decision of the Court of Appeals threatens the fragile protections of the First Amendment and endangers the artistic freedom that is a firmament of our society. [1/]

[1/] Pursuant to Supreme Court Rule 37.2(a), written consent of counsel for petitioner and respondents has been obtained and has been filed concurrently with this brief. Counsel for no party authored this brief, in whole or in part, and only HWA and its counsel have made a monetary contribution to the preparation and submission of this brief. See Supreme Court Rule 37.6.

The HWA has unique concerns about the freedom of expression. The literature of horror is a transgressive artform whose insistent confrontation of death is often misunderstood and criticized. Although horror fiction is easily compromised by lurid imagery and sensationalism, the conscientious proponents of this literature, represented here by HWA, provide an essential political, social and metaphysical discourse that is in fact our most enduring artform.[2/]

Thus, although Horace Walpole's The Castle of Otranto (1764) sparked the Gothic flame, and playwright John Webster created the first horror stories written in English, The White Devil (1612) and The Duchess of Malfi (1623), they were newcomers to the form. What some call the earliest "novel" of western civilization, Metamorphoses by Lucius Apuleius (circa 170 AD), is a fantasy about a man tormented by witchcraft. A ghost haunts Pliny's Epistles (100 AD); a werewolf stalks the Satyricon of Petronius (60 AD); and horrific elements animate the Aeneid (circa 20 BC), the Iliad and Odyssey (circa 700 BC), and the foundation of all western literature, the Sumerian epic poem Gilgamesh (circa 2000 BC). Before the written word, the

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[2/] See, e.g., Leslie A. Fiedler, Love and Death in the American Novel, New York: Dell, rev. ed. 1966; Edward J. Ingrebretsen, S.J., Maps of Heaven, Maps of Hell, Armonk, NY: Sharpe, 1996; James Twitchell, Dreadful Pleasures: An Anatomy of Modern Horror, New York: Oxford University Press, 1985; Douglas E. Winter, Stephen King: The Art of Darkness, New York: New American Library, 1984, rev. ed. 1986.

tale of horror flourished in cave paintings, in religion and ritual, and in stories told by firelight as our distant ancestors huddled together against the night and its creatures, real and imagined.

"The oldest and strongest emotion of mankind is fear," wrote H. P. Lovecraft, an early twentieth-century master of horror fiction. Not surprisingly, the first truly American novel -- Wieland, or The Transformation (1798) by Charles Brockden Brown, a Philadelphia attorney of Quaker stock -- was a horror novel. Edgar Allan Poe fathered the modern short story and the murder mystery: "The Murders in the Rue Morgue" (1841) introduced the world's first fictional detective, C. Auguste Dupin, and, in the words of Dorothy L. Sayers, "constitutes in itself almost a complete manual of detective theory." From the Universal Studios classics of the 1930s to the motion pictures of Alfred Hitchcock (including the legendary Psycho, based on the novel by late HWA member Robert Bloch), films of supernatural and psychological terror have been a staple of our entertainment. One of the most memorable, and socially relevant, television programs of the 1960s was Rod Serling's "The Twilight Zone." Today, HWA member Stephen King is the bestselling writer of our time. The importance of expressions of horror in past and present discourse – and thus, to freedom of speech – is profound, and the issues presented by this petition must be considered in that context.

STATEMENT OF THE CASE

The petition seeks review of a unique and troubling decision, reported at 128 F.3d 233 (4th Cir. 1997), which holds, for the first time in American history, that the publisher of a book may be liable in tort for the criminal acts of one of the book's readers.

The essential facts are set forth in the Petition of Paladin Enterprises. The Court of Appeals believed that Paladin's stipulation to the Joint Statement of Facts was "extraordinary." Pet. App. 17a, 33a-46a.[3/] But Paladin stipulated to facts known by all contemporary writers and publishers. "Copycat" crimes occur. Information is used and abused by the disturbed, disaffected and dangerous elements of our society. As Paladin stipulated, publishers and writers of mass-marketed works thus know that their texts may and will be used by criminals and would-be criminals to plan and execute crimes. J.A. 58-62.

[3/] References to the Appendix to the Petition for Writ of Certiorari are denoted by the abbreviation "Pet. App." References to the Joint Appendix in the Court of Appeals are denoted by the abbreviation "J.A."

SUMMARY OF ARGUMENT

A writ of certiorari should be granted in order to remedy a conflict with this Court's landmark decision in Brandenburg v. Ohio and to prevent the chilling specter of tort litigation against writers and publishers of mass-marketed works that others allegedly consult or use for criminal purposes.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW VITIATES FIRST AMENDMENT PROTECTION OF WORKS MARKETED TO A MASS AUDIENCE

In holding for the first time in American history that a publisher may be subject to tort liability for a murder committed by a reader of a book, the Court of Appeals strikes at the very heart of the First Amendment: the ability of a free press to express ideas, however unpopular, without intimidation or threat of interference by the state. The decision to deem Hit Man – and, thus, other mass-marketed expressions of the techniques of crime – unprotected speech sanctions the chilling and silencing of writers and publishers through tort litigation by anyone and everyone who thinks that they have been injured by words that were once read by a criminal. This Court should fulfill the "constitutional responsibility" of the judiciary to assure that the maintenance of litigation directed at the content of speech "does not constitute a forbidden intrusion on the field of free expression." Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 501, 508 (1984).

The First Amendment prohibits the imposition of civil liability on the publisher of a book marketed to a general audience unless its text falls within one of the few well-defined and narrowly limited classes of "unprotected speech." The only class of "unprotected speech" potentially applicable to Hit Man is that described in Brandenburg v. Ohio, 395 U.S. 444 (1969), which requires fulfillment of the heavy burden that speech is (1) "directed to inciting or producing imminent lawless action" and (2) "likely to incite or produce such action." Id. at 447.

That burden was not fulfilled: The tragic murders occurred ten years after Hit Man was first published, and fourteen months after the killer purchased the book. J.A. 59, ¶ 2; 61, ¶¶ 6,8. Paladin, like the maker of the AR-7 rifle used to commit the murders, may have known that a criminal could use what was placed in his hands to commit a heinous crime; but it is undisputed that Paladin had no knowledge of the planned killings or the role its book could play in them. J.A. 59, ¶ 3. It is also undisputed that the book contained no information that was not previously available to the public. J.A. 67-93, ¶¶ 13-32.

However, the Court of Appeals erased any requirement of "imminence," limiting Brandenburg's holding to instances of "abstract advocacy." Pet. App. 63a-67a. The Court of Appeals thus invented a new class of "unprotected speech" applicable when a book or other form of speech could be said to constitute the "aiding and abetting" of a crime. Pet. App. 26a-28a.

This unprecedented construct ignores the right of a free press to describe crime and the methods of committing crime – a right exercised with regularity in our news and entertainment, as well as political and social commentary, e.g., Truman Capote's In Cold Blood (1966).

The danger posed by the Fourth Circuit's decision is exemplified by consideration of The Killing Spirit: An Anthology of Assassins, New York: Overlook Press, 1996. Edited by Jay Hopler, this book collects Anglo-American literature about the "Hit Man," and offers, in its editor's words, "an accurate and compelling literary representation of the assassin . . ." (p. 3). Those "accurate and compelling" accounts are written by such literary giants as Ernest Hemingway ("The Killers," 1927); Graham Greene (an excerpt from This Gun for Hire, 1936); Damon Runyon ("Gentlemen, the King!" from Guys and Dolls, 1956); Joyce Carol Oates ("The Death of Mrs. Sheer," 1964); and Patricia Highsmith (an excerpt from Ripley's Game, 1993).

Like Hit Man, The Killing Spirit is what the Fourth Circuit calls "pure and simple, a step-by-step murder manual," Pet. App. 62a, setting forth detailed descriptions of murder for hire and its methodology. That Hit Man is presented as purported nonfiction is a meaningless distinction: accurate fiction conveys the same information with equally convincing, if not more persuasive, force.

Thus, Hit Man is indistinguishable from a myriad of other texts now in the marketplace. Like other nonfiction titles, Hit Man is a research tool that offers verisimilitude and authenticity to writers of fiction as well as intelligence to law enforcement and security officials. It is also entertainment. Even a brief glance at the shelves of our

libraries and bookstores shows that Americans enjoy reading about murder. "True crime" selections offer vivid nonfiction accounts of homicide and its techniques. Mystery and detective stories, espionage novels and thrillers – as well as horror fiction – focus insistently on murder and its methods.

Seen in this context, Hit Man is a prime example of postmodern "infotainment," fact and fantasy wrapped together with all the alarum of tabloid television: sensational, sordid, self-indulgent and self-mocking. It is, in other words, precisely the kind of unpopular speech that the First Amendment was intended to protect.

The Court of Appeals' decision to condemn Hit Man as a "murder manual" and, thus, unworthy of the First Amendment hinges entirely on a finding that is contrary to the undisputed (and, indeed, stipulated) facts: "If there is a publication that could be found to have no other use than to facilitate unlawful conduct, then this would be it, so devoid is the book of any political, social, entertainment, or other legitimate discourse." Pet. App. 45a.

The finding is patently erroneous, given publications like The Killing Spirit and the parties' Joint Statement of Facts, which provides in paragraph 5 that:

> a. [D]efendants' marketing strategy was and is intended to maximize sales of its publications to the public, including sales to (i) authors who desire information for the purpose of writing books about crime and criminals, (ii) law enforcement officers and agencies who desire information concerning the means and methods of committing crimes, (iii) persons who enjoy

reading accounts of crimes and the means of committing them for purposes of entertainment, (iv) persons who fantasize about committing crimes but do not thereafter commit them, and (v) criminologists and others who study criminal methods and mentality.

b. [I]n publishing, marketing, advertising and distributing Hit Man and Silencers, as well as other publications, defendants intended and had knowledge that their publications would be purchased by members of the general public, including those persons and for those purposes listed in ¶ 5(a). J.A. 60, ¶5.

The parties also stipulated that approximately 13,000 copies of Hit Man have been sold nationally. J.A. 61, ¶ 8. This sales figure exceeds that for a typical first novel sold in hardcover or trade paperback in the United States and, indeed, it is above average for general nonfiction titles sold in hardcover or trade paperback.

Moreover, the declarations submitted by Paladin – which were not disputed – confirm that Hit Man was published to, and read by, a mass audience of diverse interests, including the legitimate interests identified in paragraph 5 of the Joint Statement of Facts. J.A. 67-111.

Despite this factual record, the Court of Appeals ruled that "the audience both targeted and actually reached is, in actuality, very narrowly confined," Pet. App. 30a; and that a jury could "reasonably conclude that Paladin essentially distributed Hit Man only to murderers and would-be murderers" and that its "only genuine use is the unlawful one

of facilitating such murders." Pet. App. 43a-45a. The Court of Appeals thus effectively rewrote Hit Man and its sales history in order to eliminate the protections of the First Amendment.

It is particularly disturbing that the Court of Appeals should have ostracized Hit Man on the (mistaken) belief that the book is sold primarily by mail order. Pet. App. 44a. It is just such texts, written or published by minorities, the dispossessed and others who have no access to traditional avenues of mass market distribution (including many of HWA's members) that the First Amendment was intended to protect.

A court cannot "demonize" speech that the record plainly shows has legitimate value to Americans. For better or worse, murder is a significant element of contemporary American discourse – from ongoing debate about gun control, capital punishment, political assassination, domestic violence, self-defense and celebrity crimes to our daily news and entertainment. A book that details the modus operandi of a hired killer, whether factually or as fantasia, contributes to that discourse.

Whether Hit Man is moral, likable, tasteful, entertaining or enlightening is beside the point. The truest measure of our democratic ideal is our willingness to tolerate the most offensive and sordid expressions. "[T]he benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas." Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988). Indeed, writing that shocks or offends its readers may, as in the case of Thomas Paine or Jonathan Swift, prove

that which most effectively encourages moral thought. Texas v. Johnson, 491 U.S. 397, 408-09 (1989). For these reasons, the Court of Appeals clearly erred in excising Hit Man from the protections of the First Amendment.

II. THE DECISION BELOW EXPOSES WRITERS AND PUBLISHERS TO THE CHILLING SPECTER OF UNWARRANTED LITIGATION

The open-ended nature of the decision below is also disturbing, and a clear invitation to further lawsuits against writers and publishers. In suggesting that its result was limited in scope, the Court of Appeals repeatedly, and without explication, noted the likelihood of exceptions that might justify suit. Pet. App. 67a-71a. Thus, it wrote that there would "almost never" be evidence supporting its outcome; that "virtually" every "copycat" case would be exempt from its holding; and that inferring unlawful motive would not be reasonable "for almost any" book or movie. Pet. App. 68a-69a. These undefined but apparent exceptions expose every creative enterprise to the whims of inventive lawyers and the chilling threat of unwarranted tort litigation.

The existence of, and publicity about, "copycat" crimes have placed publishers and writers on notice that depictions of crime and violent conduct can and will be acted upon by others. When those depictions are published, then, as Paladin Press has conceded here, there is arguably (if not necessarily) an intent that the depictions may be acted upon. As a result, any work published for a legitimate end is also published with the knowledge – and thus, arguably, the intent – that it may be used for an illegitimate end. This knowledge could create an issue of fact concerning a writer's

or publisher's intent, thus preventing summary disposition of the most frivolous claims.

By supplanting the objective standards of Brandenburg and placing a writer's or publisher's intent at issue, the Court of Appeals opens the floodgates of litigation against any work claimed to have been consulted or used in a crime, and thus chills historically legitimate expressions of crime and criminal behavior in fictional and nonfictional forms. Writers and publishers would be exposed to liability "on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

The decision below thus eliminates longstanding certainty in the law governing freedom of expression and creates a dangerous precedent. The landmark decision in Brandenburg should be vindicated and the decision below reversed, thus restoring certainty to the protections of the First Amendment.

CONCLUSION

For these reasons, the Horror Writers Association respectfully requests that the Court grant the Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PALADIN ENTERPRISES, INC.,
Petitioner,

v.

VIVIAN RICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* ABC, INC., THE E.W. SCRIPPS COMPANY, MEDIA GENERAL, INC., MEDIA PROFESSIONAL INSURANCE, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NEWSPAPER ASSOCIATION OF AMERICA, PRIMEDIA INC., RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, VIACOM INC. AND THE WASHINGTON POST COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment provide a complete defense for a disseminator of information where one of the many recipients of the information engages in criminal or tortious conduct, allegedly after consulting the information, even though the disseminator did not specifically target the wrongdoer or specifically advocate the harmful conduct, which was not committed imminently following either the dissemination or the receipt of the information?

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STATEMENT OF INTEREST[1]

Amici curiae are broadcasters, publishers, a non-profit First Amendment Center, and other similarly interested organizations and associations, all of whom share a strong belief in the right of dissemination of a wide range of information and ideas to the public. Amici are well aware of the ongoing possibility that the information and ideas disseminated by them and others could be misinterpreted by a member of their audience at some future time and place, thereby leading that individual to engage in some form of antisocial conduct. A fundamental aspect of our society, however, has always been the long tradition of encouraging -- at times, simply tolerating -- and protecting the free

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[1]Petitioner and respondents have consented to the filing of this amicus brief. Letters evidencing their consent are being filed concurrently with this brief. Pursuant to Supreme Court Rule 37.6, amici curiae state that their counsel authored this brief and no party other than amici curiae made any monetary contribution to the preparation or submission of this brief. A description of each amicus curiae can be found in the Appendix.

flow of information and ideas, regardless of the savoriness of the message transmitted.

While people who live in a society afflicted with growing violence do not condone the content of petitioner's book, amici can see no principled distinction between constitutional protection for the type of information found in the book and protection for identical or similar information found in a vast array of books, periodicals, music, electronic communication, and video programming. The history of First Amendment jurisprudence in the United States repeats a theme that echoes once again in this lawsuit: from the unscrupulous rag in *Near v. Minnesota*, 283 U.S. 697 (1931), to the vulgarities in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and the flag burning in *Texas v. Johnson*, 491 U.S. 397 (1989), it is most often the speech at the fringes of American life that defines the freedoms for those at the center.

Amici urge the Court to recognize the serious and substantial harm that will be inflicted on protected communication by a decision that subjects the information in a book, regardless of how palatable its content, to general judicial scrutiny, in contrast to the long tradition of granting blanket protection to speech of all stripes, except in very narrow circumstances not present here. Thus, it is critical that the Court grant the petition and review this matter at this important juncture, for allowing this lawsuit to survive, even for a brief time, will disturb decades of First Amendment jurisprudence and jeopardize free speech from the periphery to the core.

STATEMENT OF THE CASE

While amici refer the Court to the petition for a detailed recitation of the facts, the essence of this case is quite simple and uncontroverted, and compels the result reached by the district court below.

In 1983, petitioner Paladin Enterprises, Inc. published the book *Hit Man: A Technical Manual for Independent Contractors*. Since 1983, the book has been marketed, sold and distributed through bookstores, mail order and even on the Internet, and is available in various libraries across the country. The parties agree for present purposes that over the fifteen years that the book has been available, it has been marketed and sold to the general public and specifically to, among others, authors seeking information to aid in the writing of books about crimes and criminals, law enforcement officials desiring information concerning means and methods of committing crimes, persons who enjoy reading about the commission of crimes, and criminologists. More than 13,000 copies of the book have been sold to date.

In 1991, some eight years after the Paladin book was published, Lawrence Horn conspired with career criminal and convicted felon James Perry to murder Horn's ex-wife and quadriplegic son, and collect insurance proceeds and a substantial sum held in trust for the son from the accident leading to his condition. While in the midst of planning their intended crime, in January 1992 -- almost ten years after the Paladin book's publication -- James Perry ordered a copy of the book from a mail-order catalog. Approximately fifteen months later, on March 3, 1993, Perry murdered Horn's ex-wife, son, and the son's nurse in Montgomery County, Maryland, pursuant to his 1991 agreement with Horn.

Following the successful trials and convictions of Perry and Horn, relatives and the estates of the victims instituted this action in the United States District Court for the District of Maryland, claiming that Paladin should be held civilly liable for "aiding and abetting" the crime committed by Perry and Horn based on the contention that Perry had purchased and allegedly consulted Paladin's book prior to committing his murder for hire, even though the purchase was made after the criminal scheme had been consummated and close to ten years after the book's publication. Moreover, respondents concede for present purposes that at no time prior to the commission of this gruesome crime did

Paladin have knowledge of the 1991 conspiracy between Perry and Horn to commit these crimes, and certainly not at the time of publication in 1983, or sale to Perry in 1992. Indeed, Horn's son was born after the Paladin book was first published and sold.

The Paladin book, while personally distasteful to amici, does not specifically advocate that the reader should engage in murder for hire. At its outset, the book espouses the view that "[t]here are many, many instances when atrocities are committed that the law will not or cannot pursue [a]nd other times when the law does its part but the American legal system is so poor that *real* justice is not served." *Id.* at ix. According to the author, "*In those cases*, as in cases of personal revenge and retribution, a man must step outside the law and take matters into his own hands." *Id.* (emphasis added) What then follows is a detailed story, told in the third person, of a mythical hit man in action, no different than innumerable such accounts in literature. Thereafter, the author provides a step-by-step approach to how one might commit a murder.

At no point, however, does the book address itself specifically to Perry and Horn, or advocate murdering one's family to collect insurance proceeds and trust funds, as Horn intended. Indeed, the instances in which the author might condone murder are entirely inconsistent with the reasons for Perry and Horn's actions.

In light of all of these deficiencies, shortly after this case was filed, petitioner moved for summary judgment, asserting that the First Amendment provides a complete defense against liability based upon settled authority from this Court and others around the country. To permit the district court to resolve this matter early in the proceedings and before the parties engaged in costly and protracted discovery, the parties entered into a series of stipulations for purposes of the motion only, to eliminate any factual issues that might constrain the court from ruling as a matter of law.

Following well-settled precedent of this Court and others, the district court granted summary judgment, holding that a publisher may not be held liable for the criminal acts of a reader. While recognizing that Maryland law provides a cause of action for "aiding and abetting," the court, relying on *Brandenburg v. Ohio*, 395 U.S. 444 (1969), found that the First Amendment bars recovery because the petitioner's publication and sale of the book at issue did not and could not constitute incitement to imminent lawless action.

On November 10, 1997, the United States Court of Appeals for the Fourth Circuit reversed, focusing its opinion principally on the admittedly disturbing facts and the parties' stipulations, although without finding that the Paladin book could constitute incitement to imminent lawless action.

SUMMARY OF ARGUMENT

For the first time in over a quarter century, this Court's seemingly settled safeguards for free expression have been placed in doubt by a single court of appeals decision. The holding of the court of appeals in this case is as frightening as it is unprecedented.

The Court should grant a writ of certiorari for two fundamental reasons. First, the decision of the court of appeals that the First Amendment does not provide a complete defense to liability in the absence of incitement to imminent lawless action constitutes a grave departure from well-settled jurisprudence established by this Court that threatens all but the most placid speech in our society. Moreover, the Fourth Circuit's decision represents a departure from the other courts in this country who have recognized a complete First Amendment defense in this context. Second, unless the judgment of the court of appeals is corrected, it will subject publishers, authors, broadcasters and musicians, as well as all other disseminators of all but the most benign form of information and ideas, to the serious risk of harassment and potential litigation from engaging in expressive

activity that is fundamental to our free society and has historically been accorded the highest level of protection.

It has been a usual and customary practice for the mainstream media and similarly interested organizations to intervene as amici in cases involving offensive speech to provide courts with a perspective on the First Amendment protections implicated. Accordingly, amici's participation in this case is utterly unsurprising, not "breathtaking." *Cf. Rice v. Paladin Enters.*, 128 F.3d 233, 265 (4th Cir. 1997). For these reasons, amici have found it essential at every step of these proceedings to inform this Court and the courts below of the importance of the issues at stake to more than simply the parties to this lawsuit.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT OF THE COURT OF APPEALS REPRESENTS A SERIOUS DEPARTURE FROM WELL-SETTLED LEGAL DOCTRINE GUARANTEEING PROTECTION TO PROVOCATIVE SPEECH.

The district court correctly recognized the extraordinarily limited circumstances in which speech can result in liability in our society, noting that "[t]he First Amendment bars the imposition of civil liability on Paladin unless Hit Man falls within one of the well-defined and narrowly limited classes of speech that are protected by the First Amendment." *Rice v. Paladin Enters.*, 940 F. Supp. 836, 840-41 (D. Md. 1996) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). The district court correctly concluded that the only exception into which the allegations of this case could arguably fit is the one articulated by this Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), for words likely to incite imminent lawless action. Remarkably, however, the court of appeals found that the speech at issue here was not entitled to complete immunity from liability even though that court was unable to find that the actions of the petitioner constituted incitement to imminent lawless action.

A. The Fourth Circuit's Decision Disregards Settled Jurisprudence of this Court on an Issue Fundamental to Our Society.

This Court has established, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *Hess v. Indiana*, 414 U.S. 105 (1973), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), a very high standard for judging speech that is alleged to trigger or energize unlawful or tortious conduct. The judgment of the court of appeals in this case flagrantly disregards that standard. In its stead, the Fourth Circuit substitutes a dangerously diluted view of free speech, suggesting that "the cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law." 128 F.3d at 246.

What *Brandenburg* expressly declares, quite simply, is that dangerous speech can be punished only when it amounts to "advocacy . . . *directed to inciting or producing imminent lawless action and is likely to incite or produce such action.*" 395 U.S. at 447 (emphasis added). Four years later, in *Hess*, this Court reiterated this narrow exception to the otherwise complete protection of speech in this area. For the same reasons that the Paladin book deserves protection, this Court held that the threatening speech in question was constitutionally protected. The Court determined that because the challenged statement "was not directed to any person or group of persons, it cannot be said that [the speaker] was advocating, in the normal sense, any action." 414 U.S. at 108-09. Accordingly, the Court found that "since there was no evidence, or rational inference from the import of the language, that the words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished . . . on the ground that they had a 'tendency to lead to violence.'" *Id.* (emphasis in original).

Moreover, this Court's subsequent decision in *Claiborne Hardware* eliminated any doubt about the application of the *Brandenburg-Hess* test to claims of civil liability. In *Claiborne*

Hardware, this Court held that the type of allegedly dangerous speech that was protected from criminal sanction enjoys the same protection from suits for damages, without regard to the seriousness of the harm alleged to have been caused. 458 U.S. at 932.

This Court's decisions in *Brandenburg* and its progeny make clear that a disseminator of information cannot be liable for the acts of a recipient separated from the disseminator by time and space, and to whom the disseminator did not specifically advocate a particular course of imminent conduct. Unquestionably, this Court's prior decisions in this area preclude a finding of the requisite incitement on the part of a publisher of a mass-distributed book that does not advocate that a particular individual commit a specific act against an identified target. Indeed, even in the face-to-face inflammatory encounters with the receptive audiences in *Brandenburg*, *Hess*, and *Claiborne Hardware*, the Court determined that the necessary level of "incitement" was lacking. When both time and space separate speaker and listener -- or publisher and reader -- as they do here, not only does such a finding of incitement become impossible, but also a finding of "imminence" becomes conclusively problematic. Clearly that must be the case when more than a decade separates the identified speech from the conduct in question, and more than a year passes between the sale of a book and the act of an individual claimed to have referenced that book. Were it any other way, any disseminator of information would face unlimited and open-ended liability for eternity for the unanticipated actions of any recipient who chose to act on the information obtained at some future time. Such a rule of law would wreak havoc on the free flow of ideas that has traditionally been accorded protection from liability in our society.

B. The Decision of the Court of Appeals Creates a Clear Conflict Among the Circuits on a Fundamental Issue of Constitutional Law.

Until the decision of the Fourth Circuit in this case, the courts in this country had uniformly followed this Court's pronouncements in the *Brandenburg* line of cases by protecting a disseminator of information from liability for the conduct of a recipient, regardless of the tastelessness, dangerousness, or unpatriotic nature of the content of the information, or the subsequent injury sustained.

That precept is most clearly reflected in the Fifth Circuit's holding in *Herceg v. Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), in which a fourteen-year-old boy caused his own death by closely following a magazine's step-by-step instructions for the bizarre act of autoerotic asphyxiation. Though the behavior that the magazine's instructions induced was unquestionably dangerous, likely criminal and clearly fatal, the court of appeals joined other courts in rejecting the plaintiff's attempt to impose liability upon the publisher. As the court succinctly explained in its refusal to hold the publisher responsible,

> The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweighs the costs society endures by receiving reprehensible or dangerous ideas.

814 F.2d at 1019.

In reaching its conclusion, the *Herceg* court rejected the very bases underlying the Fourth Circuit's misguided ruling below. The decedent's family had argued that the magazine's step-by-step instructions constituted actionable incitement because of the instructions' focused nature and lethal quality. The court

flatly rejected that claim, holding that "liability cannot be imposed on Hustler on the basis that the article was an incitement to attempt a potentially fatal act without impermissibly infringing upon freedom of speech." 814 F.2d at 1021. Moreover, the Fifth Circuit flatly refused to accept a less stringent constitutional standard for a publication "involving non-political speech that has actually produced harm" in striking contrast to the Fourth Circuit below. *Id.* at 1024. According to the court in *Herceg*, "If the shield of the First Amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as 'bad', all free speech becomes threatened." 814 F.2d at 1024.[2]

The Fifth Circuit is hardly alone in its conviction that publishers, broadcasters, and other disseminators of information are not civilly liable for the aberrant conduct of readers, viewers and other recipients. *See, e.g., Yakubowicz v. Paramount Pictures*, 404 Mass. 624, 536 N.E.2d 1067 (1989); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988); *DeFilippo v. NBC, Inc.*, 446 A.2d 1036 (R.I. 1982); *Smith v. Linn*, 587 A.2d 309 (Pa. 1991); *Walt Disney Prods., Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981); *High Ol' Times v. Busbee*, 621 F.2d 141 (5th Cir. 1980); *see also United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983) (reversing convictions for aiding and abetting where all but one defendant "merely instructed an audience" and did not "actually assist in the preparation of any individual tax return"), *cert. denied*, 466 U.S. 980 (1984). In each of these cases and others, the courts rejected liability of a disseminator of information despite the same type of claimed nexus between dangerous information and harmful conduct alleged in this action.

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[2]Moreover, any doubt about the clear conflict between the Fifth Circuit's holding in *Herceg* and the Fourth Circuit's determination below cannot withstand a comparison of the dissenting opinion in *Herceg* with the decision below. *See* 814 F.2d at 1028, 1030 (espousing a "limited first amendment protection" and the availability of recourse under state tort law).

In each case, the court refused to apply a lesser standard of First Amendment protection to material that was clearly not political, and could at most claim social value as entertainment. Every one of these courts recognized, as did the Fifth Circuit in *Herceg*, that "the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas." 814 F.2d at 1019. The judgment in the instant case represents a sharp break with this uniform line of precedent, and thus creates a clear conflict.

The Fourth Circuit unconvincingly attempted to liken this case to *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986), in which the Ninth Circuit recognized, as one must, that not all speech is fully protected. If one directly counsels a criminal, or directly participates in a criminal conspiracy, or directly aids and abets the commission of a specific crime, a free speech defense based simply on the fact that the participation involved communicating with co-criminals will not and should not avail.

Yet the circumstances in which speech-based convictions have been sustained differ significantly from the circumstances here. Those cases have involved instructions targeted for and conveyed exclusively to a closed and structured audience -- not the general publication of books to the entire reading public.[3] That difference is crucial. As then-Judge Kennedy recognized in *Freeman*, a conviction (for "aiding and abetting") would not accord with the First Amendment where "the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of a criminal act." 761 F.2d at 551.

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[3]Indeed, in *Freeman*, there was evidence that the defendant directly participated in the review and preparation of false tax returns; nevertheless the Ninth Circuit reversed the conviction on twelve of fourteen counts because the jury had not been allowed to consider a First Amendment defense to the aiding and abetting charges. *See* 761 F.2d at 551-52.

Such is precisely the case with the Paladin book here. Unlike the detailed and targeted instructions in *Freeman*, petitioner's book addresses a general audience on matters far beyond the potentially harmful use to which that material was allegedly applied by a single aberrant reader.

If someone were to offer a specially tailored service for would-be assassins -- compiling all the specific data pertaining to a planned crime, and returning an individualized scenario for its optimal execution -- such conduct might constitute aiding and abetting beyond the protection of the First Amendment. The "designer" might then be a knowing and potentially culpable partner in a criminal enterprise. No defense based on the use of words would invoke a First Amendment interest because there would be "[no] evidence ... that the purpose of the speaker or the tendency of his words were directed to ideas or consequences remote from the commission of a criminal act." *Id.* Such a situation is so manifestly different from what the petitioner has done in this case as to make clear the inapplicability of cases like *Freeman*. Free speech principles do not protect genuine "aiding and abetting" any more than they shield criminal conspiracies. They do, however, shield a speaker to a general audience from liability occasioned by the unknown plans and future acts of an isolated member of that audience.

II. UNLESS CORRECTED, THE JUDGMENT OF THE COURT OF APPEALS WILL EXPOSE ALL DISSEMINATORS OF INFORMATION AND IDEAS TO THE GRAVE RISK OF HARASSMENT, UNWARRANTED LITIGATION, AND UNCONSTITUTIONAL LIABILITY.

The decision of the court of appeals opens a dangerous door, subjecting those who write or speak, publish or broadcast to potential liability simply from the unintended consequences of their words. If the bare possibility exists that the victim of a criminal or tortious act might trace that act to a book and hold the author or publisher -- rather than the criminal -- liable for the harm, then

all but the most benign forms of expression would be potentially at risk. Moreover, regardless of the ultimate merits of such a case, the speaker would face the prospect of costly and burdensome litigation, however clear the eventual outcome might be.

A. The Well-Recognized Need for Early Disposition of Legal Challenges to Speech is Dangerously Undermined by the Fourth Circuit's New Standard.

As this Court has observed, fear of litigation costs "must inevitably cause publishers to steer . . . wider of the unlawful zone . . . creat[ing] the danger that the legitimate utterance will be penalized." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (internal quotations omitted). Moreover, "[t]he very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to steer far wider of the unlawful zone thereby keeping protected discussion from public cognizance." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971) (plurality opinion) (internal quotation omitted).

Based on this long-held concern that either threatened or actual protracted litigation could seriously stifle speakers spectrum-wide, courts have traditionally recognized that

> [i]n the First Amendment area, summary procedures are ... essential. For the stake here, if harassment succeeds, is free debate .... The threat of being put to the defense of a lawsuit ... may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.

Washington Post v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). Thus, courts of appeal nationwide have encouraged summary adjudication in First Amendment cases whenever possible. *See, e.g., Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992);

McBride v. Merrell Dow & Pharms., Inc., 717 F.2d 1460, 1466-67 (D.C. Cir. 1983); *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 855 (8th Cir. 1979); *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970).

The Fourth Circuit's newly articulated standard hampers the ability of speakers to achieve summary disposition in the future. Instead of affording the historic presumption of protection, the Fourth Circuit now requires an examination by judge or jury of the speaker's actual intent. Indeed, the court would appear to allow a fact-finder to infer intent from the content of the publication itself, an unprecedented practice that will open the floodgates to challenges across the spectrum of speech. Moreover, the court of appeal's apparent obsession with the parties' stipulations and dismissive assertion that they were made "[f]or reasons that are here of no concern to the court," demonstrates that the court used the very vehicle designed to set up the case for judgment on purely legal grounds as a basis for denying the relief sought. The stipulations were made solely for the purpose of allowing the courts below to dispose of this case as a matter of law. Contrary to the Fourth Circuit's apparent impression, these stipulations certainly did not constitute admissions of facts for purposes of a trial on the merits.

The Fourth Circuit's departure from the longstanding approach for disposing of unmeritorious challenges to protected speech, if left standing, inevitably will lead to greater self-censorship that ultimately will have a significant impact on the marketplace of ideas.

B. Unless Corrected Now, The Fourth Circuit's Decision Threatens Entire Genres Of Expression.

Allowing respondents' claims to continue threatens to unleash a hailstorm of derivative suits on the media as plaintiffs search for deep pockets to avenge real or imagined injuries better

recompensed by perpetrator than publisher. No expression -- music, video, books, even newspaper articles -- will be safe from civil liability. Paladin's book cannot compete for provocative effect with the frightening realism of a modern motion picture, or hope to be as convincing as the reality depicted everyday on television news, in the newspaper, or in a captivating work of fiction or non-fiction.[4]

The number of written works on "lethal" subjects alone is staggering. Crime books, mystery novels, scientific journals and military manuals abound, and -- like Paladin's book -- they can all be used for benevolent purposes, including education, research, or writing. A sampling from *Books in Print* reveals titles ranging from *Assassination: Case Studies*,[5] to *Written in Blood: The Criminal Mind and Method*.[6] There is almost no end to the catalog of works providing information on cheating,[7]

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[4]On this point, through selective quotation, the court of appeals unfairly chastised amici for their filing a brief below. In their brief, amici fairly observed that compared with fiendish fictional depictions of demented acts of murder and torture in such works as the best-selling novel *Silence of the Lambs*, the Paladin book at issue "seems almost avuncular, offering purple prose like, 'Lovingly he begins to assemble his weapon.'" *Compare* 128 F.3d at 254 (criticizing "amici's reckless characterization of the book as 'almost avuncular'") *with* Brief of Amici Curiae in Support of Affirmance in U.S. Ct. of App. 4th Cir. at 8-9. Clearly, the court's contempt for the book colored its perception about anything relating to it, including an amicus brief intended to be helpful in addressing the substantial constitutional issues.

[5]1 *Books in Print: Subject Guide* 677-78 (1995-96).

[6]*Id.* at 2408-12.

[7]*Id.* (*The Arts of Cheating, Swindling, and Murder*).

murder,[8] the mafia,[9] poisons,[10] and nearly every other aspect of crime.[11]

Many of these works are far more explicit than petitioner's book. Consider the mystery-writing handbooks. By comparison, the book at issue here seems downright amateurish alongside this advice from a licensed physician:

> Larger caliber bullets can cause considerable damage to the chest and abdomen because of both the mass and velocity of the bullet. . . .
>
> There are exceptions to this, however. A .22-caliber handgun is often used by the mob for a "hit" when the victim is shot in the head. The bullet will usually not create an exit wound because it lacks the velocity to penetrate the skull a second time; instead, it ricochets around inside the skull and causes considerable brain damage, hemorrhage and death.

Keith D. Wilson, M.D., *Cause of Death: A Writer's Guide to Death, Murder & Forensic Medicine* 103-05 (1992).

Similarly, the petitioner's book's "instructions" for picking a lock seem tame against the practical "tips" contained in another Handbook in which two detectives instruct budding authors that it is easier to break down a door or smash a window than to pick a lock. *See* Mauro V. Corvasce & Joseph R. Paglino, *Modus*

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[8]3 *Books in Print: Subject Guide* 6412-13 (1995-96) (*The Art of Murder*).

[9]*Id.* at 5739 (*Killing for Profit: The Social Organizations of Felony Homicide*).

[10]*Id.* at 7402 & 7403 (*A Handbook for Poisoners*).

[11]A sampling of the titles found in *Books in Print* is contained in the Appendix.

Operandi: A Writer's Guide to How Criminals Work 164-68 (1995). They also offer this insight:

> [L]et's give you an inside tip on what burglars do to give them more time to escape when you arrive home a little earlier than planned. They place small pieces of broken toothpicks in the keyhole after they enter. The reasons for this is your key will not fit into the lock, so you cannot enter your home. The noise that you make trying to open your door will alert our burglar that you are home.

Id. at 165; *see also* Mauro V. Corvasce & Joseph R. Paglino, *Murder One: A Writer's Guide to Homicide* 92 (1997) (describing a method for killing an unsuspecting patron of a public restroom). Other instructional manuals, including publications by manufacturers of explosive devices, are no less "dangerous" in the wrong hands. *See, e.g., Blaster's Handbook* (DuPont Co., 1980); *Explosives and Rock Blasting* (Atlas Powder Co., 1987).[12]

Aficionados of advanced weaponry and army lore consume a variety of military field and training manuals, which carry the same potential for abuse as the petitioner's book. Examples (with Department of Army identifiers) include: *Boobytraps* (FM 5-31) and *Improvised Munitions Handbook* (TM 31-210).[13]

Of course, the silver screen can be as fertile a source for criminal ideas as the printed word. Murder and mayhem are popular cinematic subjects invariably presented in far more provocative and graphic fashion than anything imagined in the

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[12]A more complete list of titles from each of these categories is attached in the Appendix. These titles were all obtained from the Library of Congress.

[13]Ironically, the court below focuses on what it perceives as the dangers the book at issue creates, but at the same time fills its opinion with large excerpts. Under the Fourth Circuit's theory, rather than going to the trouble of purchasing Paladin's book, the industrious criminal can now find the same information in volume 128 of the third series of the Federal Reporter.

book at issue here. For example, *The Mechanic* (United Artists 1972) showcases Charles Bronson teaching Jan Michael Vincent the craft of the contract killer, with detailed steps in the planning and execution of assassinations. *The Godfather* (Paramount 1972) includes details on removing serial numbers from guns, taping the grip and trigger of the weapon to prevent fingerprints, and hiding weapons to avoid detection while being frisked. *On Deadly Ground* (Warner Bros. 1994) features Steven Seagal demonstrating the conversion of an ordinary two-liter soft drink bottle into a silencer. *Marked for Death* (20th Century Fox 1990) showcases techniques for building and test-firing silencers. And, *The Exterminator* (Interstar/AE 1980) demonstrates how to fill hollowpoint bullets with mercury to increase deadly efficiency. These and similar descriptions could fill thousands of pages and hours of film and videotape.

Even journalism -- from the avant-garde to the mainstream -- would not be spared potential liability. In the politically charged 1960's, for instance, *The New York Review of Books* offered its readers front-page instructions on how to make a Molotov cocktail at a time when Molotov cocktails were relatively new to the average American's lexicon. *See New York Review of Books*, Aug. 24, 1967. More recently, *Life* magazine published a technically accurate schematic of a deadly bomb as part of its coverage of airport security. *Life*, March 1989.

Drawing a distinction between the speech in these works and the speech in the book under attack in this lawsuit -- based on the impermissible assessment that petitioner's book provides less "value" to society or is formatted as an "instructional" manual -- is an impossible exercise. Moreover, even if such distinctions could be made in some principled way, the task itself is inimical to our heritage and our laws. *See Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982) ("The First Amendment standards are not adjusted to a particular type of publication or

particular subject matter."), *cert. denied*, 462 U.S. 1132 (1983). As Judge Easterbrook aptly acknowledged:

> Much speech is dangerous. Chemists whose work might help someone build a bomb, political theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake. Unless the remedy is very closely confined, it could be more dangerous to speech than all the libel judgments in history.

American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 333 (7th Cir. 1985). Courts have consistently rejected distinctions based on the value or style of speech because constitutional protection

> is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 689 (1959); *Herceg*, 814 F.2d at 1024 (distinguishing types of speech "would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality").

As Justice Scalia observed, "All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 235 (1987) (Scalia, J., dissenting). Permitting this case to continue will engender a new tort against the written word -- a futile exercise in "pigeonholing [that] endangers the pigeon." Laurence Tribe, *American Constitutional Law* §§ 12-18 at 943 (2d ed. 1988).

CONCLUSION

A word, a lyric, a film clip -- these are the living embodiments of our proud heritage of defending the rights of even the most outrageous speaker. They are capable of enriching, entertaining, educating, and -- occasionally -- shocking and horrifying. But, whatever their power, they are incapable of acting. To hold a word or an image jointly responsible for even the most ghastly criminal act diminishes us all, because it means that some valuable speech surely will be chilled in the process.

For the foregoing reasons, amici curiae respectfully urge this Court to grant the petition for a writ of certiorari.

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Appendix

APPENDIX

IDENTITY OF INDIVIDUAL *AMICI*

ABC, Inc., a wholly owned subsidiary of The Walt Disney Company, is a broad-based communications company with significant holdings here and abroad. It operates the ABC Television Network and ten television stations, eight network radio program services and 21 radio stations. It is a major supplier of cable television programming through its interests in ESPN, Lifetime and A&E Television Networks. The Company also publishes seven daily and numerous weekly newspapers, as well as various specialized trade and business periodicals and books. It has significant interests in international broadcast and cable ventures.

The E.W. Scripps Company operates nine large-market television stations; daily newspapers in 16 markets; two television production companies – Los Angeles-based Scripps Howard Productions and Knoxville's Cinetel Productions; United Media, a licensor and syndicator of news features and comics; and Home & Garden Television, a 24-hour cable television network.

Media General, Inc. is the parent company of the publisher of the *Richmond Times-Dispatch* and is an independent, publicly owned communications company based in Richmond, Virginia, with interests in metropolitan newspapers, broadcast and cable television, recycled newsprint production and diversified information services.

Media/Professional Insurance, Inc. is the nation's largest provider of insurance for matter published or broadcast. As such, it is keenly aware of the practical implications of how the First Amendment is applied and interpreted.

The National Association of Broadcasters ("NAB"), founded in 1922, is a non-profit trade association that serves and represents radio and television stations and over-the-air networks.

NAB works to protect and enhance the ability of its members to freely disseminate news, public affairs, entertainment and other programming to the American people.

National Broadcasting Company, Inc. owns, operates and is the licensee, directly or indirectly, of thirteen television stations. The NBC News Division produces two-and-one-half hours of morning news programming (SUNRISE and TODAY) and NIGHTLY NEWS WITH TOM BROKAW each evening. In addition, NBC News produces DATELINE NBC, broadcast four evenings a week, as well as MSNBC, the 24-hour cable news and information network. NBC also broadcasts programming throughout the United States through the NBC television network, the CNBC cable financial news service and the more than 200 NBC-affiliated stations.

The Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of approximately 1,500 newspapers in the United States and Canada. NAA members account for approximately 90 percent of the daily newspaper circulation in the United States and include many non-daily U.S. newspapers. NAA has had a long-standing tradition of advancing the cause of a free press.

Primedia Inc., with 1996 sales of $1.4 billion, is the authoritative source of specialized information in targeted media (specialty magazines, trade magazines, consumer and business information), and education (classroom and workplace learning). Some key brands include *Seventeen, Soap Opera Weekly, American Baby, Modern Bride, Channel One, Weekly Reader, Westcott*, and *World Almanac*.

The Radio-Television News Directors Association is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives, educators, students and others in the radio, television and cable news businesses in over thirty countries.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news editors and reporters dedicated to defending the First Amendment and freedom of information interests of the print and broadcast media.

The Society of Professional Journalists is the largest and oldest membership organization for journalists in the world. The Society is a not-for-profit, voluntary association with a membership of 14,000 professionals and students engaged in every branch and rank of journalism, and for more than 80 years has been dedicated to perpetuating a free press.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan institution in Charlottesville, Virginia, whose sole mission is the safeguarding of freedoms of expression defined in the First Amendment of the United States Constitution. The Center has pursued its mission in several ways, including testimony before legislative and administrative bodies, public statements, and involvement in litigation that may affect free expression. The Center has filed briefs amicus curiae in state and federal courts in a wide variety of cases, seeking recognition and affirmation of freedoms of speech and press.

Viacom Inc. is a diversified entertainment and publishing company with operations in four segments: (1) networks and broadcasting; (2) entertainment; (3) video and music/theme parks; and (4) publishing. The networks and broadcasting segment includes MTV, Showtime, Nickelodeon, and VH1, plus broadcast television stations. The entertainment segment, which includes Paramount Pictures and the partially owned subsidiary Spelling Entertainment Group Inc., produces and distributes theatrical motion pictures and television programming, including news, news/magazine, and talk shows. The publishing segment, which includes Simon & Schuster, MacMillan Publishing USA, and Prentice Hall, publishes and distributes education, consumer, business, technical and professional books, and audio-video software products.

The Washington Post Company ("Company"), a communications company, owns publications and broadcast properties engaged in newsgathering and reporting. The *Washington Post*, a division of the Company, is a daily newspaper of general circulation primarily in Virginia, Maryland, and Washington, D.C. The *Post* has a daily circulation of over 800,000 and a Sunday circulation of over 1.1 million.

Partial List of Available Works
Containing Potentially Provocative Speech

I. Books in Print.

Assassination[14]

Assassination: Case Studies
Assassinations and Executions: An Encyclopedia of Political Violence
Assassins
Encyclopedia of Assassinations
Plots and Conspiracies

Crime and Criminals[15]

The Arts of Cheating, Swindling and Murder
Bloody Business
The Chronicle of Crime: Infamous Felons of Modern History and Their Hideous Crimes
Encyclopedia of Unsolved Crimes
Games Criminals Play: How You Can Profit by Knowing Them
Great Unsolved Crimes
Making Crime Pay
The Mammoth Book of Murder
Medical Reference Guidebook of Crime and Crime Research
Mind of the Murderer
The Signs of Crime: A Field Manual for Police
Why Does Crime Pay?
Writer's Guide to How Criminals Work

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[14]1 *Books in Print: Subject Guide* 677-78 (1995-96).

[15]*Id.* at 2408-12.

Written in Blood: The Criminal Mind and Method

Crime and Criminals -- Bibliography[16]

A Book of Remarkable Crimes

Crime and Criminals -- United States[17]

Cop Talk: True Detective Stories from the NYPD
Love Me, I'm a Criminal, or How to Get Away With Murder
Unsolved: Great Mysteries of the 20th Century
Unsolved Crimes

Detective and Mystery Stories -- Technique[18]

Cause of Death: A Writer's Guide to Death, Murder, and Forensic Medicine
Modus Operandi: A Writer's Guide to How Criminals Work
Police Procedural: A Writer's Guide to the Police and How They Work
Scene of the Crime: A Writer's Guide to Crime Scene Investigation

Homicide Investigations[19]

Homicide Events Reconstruction Guide
How to Solve a Murder: The Forensic's Handbook

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[16] *Id.* at 2412.

[17] *Id.* at 2414-17.

[18] 2 *Books in Print: Subject Guide* 2606-07 (1995-96).

[19] *Id.* at 4461.

Mafia[20]

Blood and Honor: Inside the Scarfo Mob – The True Story of the Most Violent Mafia Family
Body Mike: The Unsparing Exposé by the Mafia Insider Who Turned on the Mob
Contract Killer: The Explosive Story of the Mafia's Most Notorious Hitman
Killing for Profit: The Social Organizations of Felony Homicide
The Mafia
The Mafia Encyclopedia
Men of Dishonor: Inside the Sicilian Mob
Murder Machine: A True Story of Murder, Madness, and the Mafia
Rubouts: Mob Murders in America
Triggerman: The First Volume of John Ragusa's Mafia Secrets

Murder[21]

Anatomy of a Massacre
The Art of Murder
Bitter Blood: A True Story of Southern Family Pride, Madness, and Multiple Murder
Blood Games: A True Account of Family Murder
The Book of Murder
Butcher's Dozen: 13 Famous Michigan Murders
Crimes of Passion
Everything She Ever Wanted: A True Story of Obsessive Love, Murder
Getting Away With Murder: 57 Unsolved Murders with Reward Information
In Cold Blood

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[20]3 *Books in Print: Subject Guide* 5739 (1995-96).

[21]*Id.* at 6412-13.

Lovers, Killers, Husbands, Wives
Marrying the Hangman: A True Story of Privilege, Marriage and Murder
The Murderer and His Victim
Questions and Answers About Murder
Still Unsolved: Great True Murder Cases

Poisoning/Poisons[22]

Crimes Involving Poisons: A Manual for Criminal Investigators
Deadly Doses: A Writer's Guide to Poisons
A Handbook for Poisoners
Handbook of Poisoning
A Handbook of Poisons
Poison! The World's Greatest True Murder Stories
Poisons and Antidotes

II. Instructional Manuals.

Blaster's Handbook (DuPont Co., 1980)
Bombs and Bombings (Charles C. Thomas Publishers, 2d ed. 1996)
The Chemistry and Technology of Explosives (Pergamon Press, 1969)
Dangerous Properties of Industrial Materials (Von Nostrand Reinhold, 8th ed. 1994)
Explosives and Rock Blasting (Atlas Powder Co., 1987)
Handbook of Reactive Chemical Hazards (Butterworth-Heinemann, 5th ed. 1995)

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[22] *Id.* at 7402 & 7403.

Hazardous Chemicals Data
(National Fire Protection Ass'n, 1994)
The Science of Industrial Explosives
(IRECO Chemicals 1974)

III. Army Field Training Manuals.

Boobytraps (FM 5-31)
Demolition Materials (TM 9-1375-213-34)
Disable a Bridge (TC 5-6-16)
Explosive Ordnance Disposal Service and
Unit Operations (FM 9-15)
Explosive Ordnance Reconnaissance (FM 9-16)
Explosives and Demolitions (FM 5-25)
Improvised Munitions Handbook (TM 31-210)
Incendiaries, Unconventional Warfare Devices
and Techniques (TM 31-201-1)
Military Chemistry and Chemical Compounds (FM 3-9)
Military Pyrotechnics (TM 9-1370-203-20&P)
Special Forces Operational Techniques (FM 31-20)
U.S. Army Military Explosives (TM 9-1300-214)

IV. Film.

The Killers (1946)
Kiss of Death (1947)
Suddenly (1954)
Murder, Inc. (1960)
The Killers (1964)
The Liquidator (1966)
The St. Valentine's Day Massacre (1967)
The Brotherhood (1968)
The Assassination Bureau (1969)
The Mechanic (1972)
The Valachi Papers (1972)
Scorpio (1972)
The Day of the Jackal (1973)
The Man with the Golden Gun (1974)

94 and 44/100 Percent Dead (1974)
Mr. Majestyk (1974)
The Eiger Sanction (1975)
Three Days of the Condor (1975)
Brass Target (1978)
The Big Sleep (1978)
Buddy Buddy (1981)
Prizzi's Honor (1985)
Wild Geese II (1985)
Pulp Fiction (1994)

(5)

Supreme Court, U.S.
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No. 97-1325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PALADIN ENTERPRISES, INC.,
Petitioner,
v.

VIVIAN RICE, as guardian and next friend of TAMIELLE HORN, MARILYN FARMER, co-personal representative of the ESTATE OF MILDRED HORN, TIFFANI M. HORN, co-personal representative of the ESTATE OF MILDRED HORN, MICHAEL D. SAUNDERS, individually and next friend of COLIN D. SAUNDERS, a minor, and personal representative of the ESTATE OF JANICE Y. SAUNDERS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER PALADIN ENTERPRISES, INC.

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REPLY BRIEF OF PETITIONER PALADIN ENTERPRISES, INC.

Petitioner Paladin Enterprises, Inc. ("Paladin") respectfully submits this Reply to Respondents' Brief in Opposition ("Opp.") to its Petition for a Writ of Certiorari ("Petition") filed herein.

1. The appropriate reach of this Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), is—as Respondents implicitly concede, *see* Opp. at 14-22—at the center of this case. It is also at the heart of ongoing congressional efforts to legislate restrictions on the public availability of information that may prove useful to criminals. *See* App. 141a-223a.[1] In *Brandenburg*, this Court *held* that expression that champions the "use of force or of law violation" forfeits its claim to constitutional protection only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," 395 U.S. at 447, a holding that would appear on its face to preclude Respondents from maintaining this civil action against this Petitioner, *see* App. 74a-99a (district court's opinion). The Court of Appeals, however, has concluded that *Brandenburg*'s application should be limited to "abstract advocacy," a concept that apparently " 'envelops critical, but abstract, discussions of existing laws,' " but not Petitioner's book or other " 'speech which urges listeners to commit violations of current law,' " App. 25a (quoting *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985)), or otherwise "prepare[s]" or "steel[s]" them for illegal action in the future, App. 65a (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)). The Department of Justice has pronounced the issue a "difficult" one and, in marked contrast to the Fourth Circuit, has candidly acknowledged that "a 'generalized' attempt to aid crime through publication is 'not the same as preparing a group for violent action.' " App. 204a (quoting *Noto*). Senator Feinstein,

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[1] References to the Appendix to the Petition are denoted herein as "App." References to the Joint Appendix in the Court of Appeals are denoted as "J.A."

the principal sponsor of the aforementioned legislation, has asserted that "over twenty years" have now passed since this Court decided *Brandenburg* and that it therefore "may be time, especially in light of Oklahoma City and the World Trade Center bombings, for the Supreme Court to deal with this issue again." 141 Cong. Rec. S7684 (daily ed. June 5, 1995) (statement of Sen. Feinstein).

2. For their part, Respondents assert that there is no need for the Court to "deal with this issue again." Instead, Respondents endorse the Fourth Circuit's suggestion that *Brandenburg*'s solitary citation to *Noto v. United States*, 367 U.S. 290 (1961), establishes that the First Amendment "does not insulate a defendant from liability when the defendant's speech goes beyond the bounds of abstract advocacy and into the realm of providing specific instruction that aids and abets another in the commission of a criminal offense." Opp. at 14. The distillation of such a constitutional rule from *Brandenburg*'s isolated reference to *Noto* is, as the Fourth Circuit and the Justice Department have each conceded, *see* App. 64a-65a, 204a, less than clear from the text of this Court's opinions in either case. On its face, *Noto* speaks only to the role of the First Amendment in "closed group" settings in which words are used to further a clandestine group's criminal designs. *See* 367 U.S. at 297-98.[2] By the same token, this

[2] In this regard, the hypothetical conjured by Respondents, *see* Opp. at 16, begs the relevant constitutional question. If the hypothetical envisions a "closed group" setting in which like-minded Klansmen secretly conspire to commit violent and illegal acts, there is a credible argument that *Noto* remains good law and that *Brandenburg* does not apply, a distinction that Paladin advanced below and the Fourth Circuit dismissed in a footnote. *See* App. 62a n.9. Even if the scenario described in Respondents' hypothetical occurred in a public place in the presence of television camera crews (as in *Brandenburg* itself), the Klansmen could surely be prosecuted for aiding and abetting a murder if—as the hypothetical suggests—the information disseminated served no purpose for its intended audience other than the facilitation of crime. *See* Petition at 23 & n.21 (quoting *United States v. Mendelsohn*, 896 F.2d 1183, 1185 (9th Cir. 1990) (bookmaking program distributed only to audience of would-be criminals)). But, if the information were

Court has never extended *Noto*'s reach to expression disseminated to a mass, public audience, whether it is gathered in an open field surrounded by television cameras as in *Brandenburg* itself, massed on a city street as in *Hess v. Indiana*, 414 U.S. 105 (1973), seated in a public auditorium as in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), or receiving advertisements directed to the public at large as in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977). Perhaps most significantly, the Fourth Circuit's effort, seconded by Respondents, to transform *Brandenburg*'s unadorned citation to *Noto* into a reformulation of its otherwise unambiguous holding conflicts with the lion's share of scholarly commentary about that landmark decision, which has rightly praised its central role in disavowing the narrow conception of the First Amendment previously articulated in cases such as *Noto*. *See* Petition at 16-17 & n.16. For all of these reasons, the decision below cannot reasonably be reconciled with *Brandenburg*.

3. Even accepting *arguendo* that the Fourth Circuit's holding represents its effort to come to grips with what it characterized as "elliptical" guidance emanating from *Brandenburg*, Respondents cannot wish away the conflict its decision creates in the lower courts. The Fourth Circuit unambiguously holds that, even when—as in this case—the expression at issue is disseminated to a mass audience of undifferentiated readers, *Brandenburg*'s application is limited to "abstract discussions of existing laws" and related "discourse critical of government, its policies, and its leaders." App. 32a. The cases referenced in the Petition at pages 19-24, most notably the Fifth Circuit's decisions in *High Ol' Times, Inc. v. Busbee*, 621 F.2d 141 (5th Cir. 1980), and *Herceg v. Hustler Maga-*

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disseminated to a mass, undifferentiated audience for which it served a variety of lawful purposes, as Respondents have *stipulated* in this case, the Klansmen would properly be subject to criminal prosecution or civil liability based on their expression only if it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," as required by *Brandenburg*. 395 U.S. at 447.

zine, Inc., 814 F.2d 1017 (5th Cir. 1987), expressly embrace the contrary proposition and hold that *Brandenburg* applies to expression that bears no resemblance to the "abstract advocacy" described by the Fourth Circuit here. Respondents cannot harmonize this plain conflict in the circuits by observing that, in *Herceg*, the magazine's detailed instructions came adorned with a disclaimer of any intent that they be followed. *See* Opp. at 14. In fact, the disclaimer before the Fifth Circuit in *Herceg* is remarkably similar to the one prominently featured in *Hit Man* and summarily rejected as at all relevant by the Fourth Circuit here. *Compare Herceg v. Hustler Magazine, Inc.*, 814 F.2d at 1024 *with* App. 63a n.10.[3]

4. Respondents' inability to harmonize the Court of Appeals' decision with those of other circuits is illustrated most starkly by their brief footnote addressing the Fifth Circuit's contrary holding in *High Ol' Times, Inc. v. Busbee*. *See* Opp. at 12 n.4. In *Busbee*, the Fifth Circuit held unconstitutional a Georgia statute, Ga. Code § 26-9912, which made it a crime to "disseminate information primarily for one or more of the following purposes: (d) to . . . describe, explain, depict or display any method by which a dangerous drug or controlled substance may be obtained or produced."[4] In support of the statute, the

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[3] Respondents' further effort to distinguish *Herceg*—by suggesting that it involves an article presented for "artistic, entertainment, or educational purposes," Opp. at 13—cannot be reconciled with their *stipulation* in this case that *Hit Man* as well is marketed to a broad audience for which it serves *identical* salutary purposes. *See* App. 17a n.2 ¶¶ 5.a. & 5.b. Indeed, Respondents' contention that *Hit Man* contains no "political or social discourse," Opp. at 17, is both contrary to the undisputed record, *see* Petition at 5-6, 12-13 n.11, and well settled law, *see, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("The commission of crime . . . [is] without question . . . of legitimate concern to the public . . . ."); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991); *Winters v. New York*, 333 U.S. 507 (1948).

[4] Contrary to Respondents' suggestion, *see* Opp. at 13 n.4, no such provision was contained in the "headshop" law upheld by this Court in *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) ("The ordinance . . . does not prohibit or otherwise regulate the sale of literature itself.").

State explained that it was designed to reach books such as *The Whole Drug Manufacturers Catalogue*, which contained detailed formulae, instruction, and diagrams depicting the laboratory apparatus and configuration necessary to synthesize and produce at least 22 illegal drugs and controlled substances. *See* J.A. 127. For example, the book—which the State introduced in evidence in *Busbee* and Petitioner entered in the record below in this case—contains the following section concerning the "Synthesis of Methamphetamine":

> This process is a complete laboratory guide to making meth crystal. It uses non-restricted chemicals, unlike most speed formulas, and includes illustrations of the complete lab set-up, a list of all the supplies with exact sizes, amounts, and all other info needed to purchase what is required. The instructions are explicitly detailed and are easy to follow. . . .
>
> Set up the reaction flask as shown in figure #5. The nitrogen is turned on and the system is flushed.
>
> Add to the flask 16.2 grams of magnesium turnings and 66.6 milliliters of anhydrous ether.
>
> Next is added a small crystal of iodine and 25 ml of a solution of 84.3 ml of benzyl chloride dissolved in 333.3 ml of anhydrous ether. . . .

J.A. 138. Unambiguously holding that *Brandenburg* protected such "instruction," the Fifth Circuit affirmed the district court's conclusion that "[r]easonable minds could not differ, the requisite seriousness of threat and imminence of action are not presented in *any* of the sample material entered into evidence. . . . The test of 'inciting or producing imminent lawless action' in *Brandenburg v. Ohio, supra*, is simply not satisfied by the plaintiffs' sale or display of the books, magazines, and posters exemplified herein." 456 F. Supp. at 1040 (emphasis added). In stark conflict with the decision in this case, therefore, the Fifth Circuit in *Busbee* held that *Brandenburg* prohibited "the imposition of liability for specific training intended to facilitate criminal acts." Opp. at 12 n.4.

5. Most recently, the Eleventh Circuit has applied *Brandenburg* to invalidate an Alabama statute prohibiting expenditure of public funds to finance expression that "provides information . . . . that explain[s] how" illegal acts such as sodomy "may be engaged in or performed" (while expressly exempting from its prohibitions "political advocacy of a change in the sodomy and sexual misconduct laws of this state"):

> It is well-established that the First Amendment protects advocacy to violate a law. *Brandenburg v. Ohio*, 395 U.S. [at 448-49]. That protection is limited in one important respect: The First Amendment does not "permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to *inciting or producing imminent lawless action and is likely to incite or produce such action.*" *Id.* at 447.

Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1545, 1547-48 (11th Cir. 1997). The Eleventh Circuit's holding, which like *Busbee* and *Herceg* simply cannot be reconciled with the decision below, declared the above-referenced statutory language unconstitutional despite its exemption of the kind of "abstract advocacy" referenced by the Fourth Circuit here. According to the Eleventh Circuit, a court "would have to ignore the Supreme Court's instructions and rewrite the statute for it to pass constitutional muster because advocacy to violate the law is protected speech unless directed to inciting or producing imminent lawless action." *Id.* at 1550.

6. The aforementioned conflict in the circuits is not erased by the Court of Appeals' observation, echoed by Respondents, that "'*every* court that has addressed the issue . . . has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.'" Opp. at 2 (quoting App. 22a). Petitioner has never advanced the position that the First Amendment "necessarily" erects a "bar" to such liability simply because it involves the "spoken or written word." Such an argument—which the

Ninth Circuit has rightly labeled a "specious syllogism," *see United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982)—has no relevance either to the district court's decision in this case or to the analogous decisions of at least four other circuits that have applied *Brandenburg* in a variety of settings in which the written or spoken word was alleged to facilitate criminal conduct, *see* Petition at 21-23 & n.21.[5] Thus, contrary to Respondents' suggestion, *see* Opp. at 9-10, the Ninth Circuit applied *Brandenburg* in *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985), and in the other cases cited in the Petition at page 22 n.21, an exercise that would have been unnecessary if, as Respondents contend, the First Amendment is of no relevance whenever words are used to "aid and abet" a crime. *See also Bond v. Floyd*, 385 U.S. 116 (1966) (statute criminalizing expression that "aids and abets" draft resistance must comport with First Amendment). Indeed, several cases cited by Respondents for the unremarkable proposition that the First Amendment imposes no *absolute* bar to criminal prosecution for aiding and abetting crimes through speech, *see* Opp. at 10-12, so state only in the course of finding that the expression at issue constituted actionable "incitement to imminent lawless action" as required by *Brandenburg*. *See, e.g., United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978).

7. Respondents' final effort to avoid the plain conflict created by the Court of Appeals' reformulation of the *Brandenburg* standard is premised on the "second and alternative basis for its ruling," *i.e.*, that "at the very least, the Respondents were entitled to a jury trial under the *Brandenburg* standard" because Petitioner has stipulated

[5] Respondents' effort to explain away the conflict between the decision below and *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), on the ground that the government there "attempted to prosecute the defendants for doing nothing more than promoting and publishing a *legal* tax shelter program," Opp. at 9 n.3, is demonstrably in error. In *Dahlstrom*, the Ninth Circuit expressly predicated its holding on the assumption that "the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally." 713 F.2d at 1428.

to the requisite intent to sustain a criminal conviction for "aiding and abetting." Opp. at 3 (citing App. 64a n.11). This "alternative" holding—dispensed by the Court of Appeals in a brief footnote—erroneously substitutes the publisher's subjective intent for the objective inquiry mandated by *Brandenburg* and its progeny, *see* Petition at 17-18, and improperly reads the "imminence" requirement out of the *Brandenburg* standard. In any event, the so-called "alternative holding" is a red herring on its own terms, included as it is in a decision that otherwise devotes 71 printed pages to informing the district court that *Brandenburg* is irrelevant to the case such that a jury instruction or further motions practice invoking *Brandenburg* would be plain error.[6]

8. Despite the fact that it is the subject of substantial analysis by both the Department of Justice, *see* App. 186a-93a, and by Petitioner below, Respondents continue to misapprehend the relevance of *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), to this case. Both decisions, as Respondents are quick to assert, hold that the publication of lawfully acquired information may not constitutionally form the basis of civil or criminal liability absent a governmental interest of "the highest order." Opp. at 4

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[6] Much of Respondents' submission in this Court is devoted to an argument *not* embraced by the Court of Appeals—*i.e.*, their assertion that Petitioner's stipulated "intent," standing alone, is sufficient to render *Hit Man* unprotected by the First Amendment. *See* Opp. at 1-2, 21. By citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to support this contention, *see* Opp. at 21, Respondents have the law exactly backwards. The speaker's motives, *Sullivan* holds, may—if sufficiently innocent—serve to *extend* protection to expression that would otherwise fall beyond the reach of the First Amendment, such as defamatory falsehoods. There is simply no basis in First Amendment jurisprudence for Respondents' far different suggestion that the speaker's state of mind, standing alone, is sufficient to strip expression of First Amendment protection. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1998) ("[W]hile . . . a bad motive may be deemed controlling for purposes of tort liability . . . we think the First Amendment prohibits such a result in the area of public debate. . . .").

(citing *The Florida Star v. B.J.F.*, 491 U.S. at 533). As the Justice Department has observed, however, where—as in this case—the information is not only lawfully obtained, but *already publicly available from other sources,* this Court "has been unwilling to find that a restriction on publication of that information is 'narrowly tailored' to address a state interest" or that any " 'meaningful public interest' can be served by further restriction under such circumstances." App. 192a (quoting *The Florida Star v. B.J.F.*, 491 U.S. at 535). Accordingly, the Fourth Circuit's decision, which imposes liability on the publication of lawfully acquired information already in the public domain, *see* Petition at 25-26, conflicts with this Court's decisions in *The Florida Star* and *Daily Mail.*

9. Citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936), and *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622 (1994), Respondents assert that, even if the First Amendment standard articulated by the Fourth Circuit conflicts with *Brandenburg* and the subsequent decisions of other circuits, review by this Court is premature until after discovery and trial. Opp. at 2. *Ashwander*, however, has no relevance where, as here, the summary judgment entered by the district court and reversed by the Court of Appeals raises squarely and exclusively an issue of constitutional law. "Delaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 485-86 (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974)). Indeed, in *Turner Broadcasting*, this Court in fact determined the appropriate First Amendment standard to govern the constitutional challenge at issue there and remanded solely for the development of a factual record to which that standard could be applied. In this case, the *only* question before this Court is the appropriate constitutional standard, a question that arises in the context of a stipulated

and unambiguous record, and is—as in *Turner Broadcasting*—properly resolved at this juncture.

10. In the last analysis, this Court's intervention is especially appropriate because, Respondents' protestations notwithstanding, this case is not "'unique in the law,'" Opp. at 25 (quoting App. 71a), and the constitutional standard articulated by the Fourth Circuit will—if not disavowed by this Court—deprive the public of a broad range of heretofore constitutionally protected expression. Although they make every effort to demonize this Petitioner and its book before this Court, the fact remains that Respondents have stipulated—and Paladin has independently demonstrated, *see* J.A. 90 ¶¶ 24-25 & 91 ¶¶ 27-28—that *Hit Man* was published for the purpose of providing, and did in fact provide, entertainment to an undifferentiated audience that harbors no criminal designs of any sort, as well as useful information to a readership that included, *inter alia*, law enforcement officers and mystery writers, *see* App. 17a n.2 ¶¶ 5.a & 5.b.[7] Thus, the array of books, magazines, newspaper articles, television reports, and motion pictures placed before the district court can, just as *Hit Man*, be fairly described as containing information useful to would-be criminals and "boldly proselytizing and glamorizing the crime of murder and the 'profession' of murder as it dispassionately instructs on its commission." App. 42a. If the potential for such "findings" is, as the Court of Appeals expressly holds, "more than sufficient to create a triable issue of fact as to" a publisher's intent, *id.*, and the publisher's pretrial protests to the contrary are, as Respondents contend, "at most" a misdirected "jury argument," Opp. at 26, then all of those works are now in jeopardy. Petitioner respectfully submits that the First Amendment cannot tolerate such a result.

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[7] Respondents, therefore, both mislead the Court when they selectively quote from the parties' stipulations, *see* Opp. at 1, and affirmatively distort the record to which they stipulated when they represent that "Paladin published a murder manual intended to train killers, not a novel intended to entertain, or a news report intended to inform." Opp. at 25.

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